TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 170.

JOAQUIN MARTIN, PLAINTIFF IN ERROR,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED SEPTEMBER 21, 1894.

(15,686.)

In the recent case of Merchants' Cotton Press Co. *vs.* Ins. Co. the above rule in New Orleans *vs.* Winter is referred to and affirmed, and after quoting some of the language in Peninsular Iron Co. *vs.* Stone the court adds: "The voluntary joinder of the parties has the same effect for purposes of jurisdiction as if they had been compelled to unite."

Merchants' Cotton Press Co. *vs.* Ins. Co., 151 U. S., 368, 384.

The several amendments to the original act of 1789, prescribing the jurisdiction of United States circuit courts, have never attempted to enlarge the jurisdiction of these courts. On the contrary, as said in the following case, the act of 1875 restricted rather than enlarged the jurisdiction of the United States circuit courts.

Smith *vs.* Lyon, 133 U. S., 315, 319.

The Constitution gives jurisdiction to the United States courts in "controversies between citizens of different States," and Congress cannot enlarge this jurisdiction.

All of the cases from Hepburn *vs.* Ellzey to the present time have put this question of jurisdiction upon the ground that the District of Columbia was not a State within the meaning of this clause.

Hence no act of Congress could change the law as laid down in that case.

Many of the cases cited were decided since the act of 1875 and the act of 1888, defining the jurisdiction of the United States circuit courts, and in none of them has the well-settled rules referred to been deemed to have been changed or modified in the least.

It is respectfully submitted that the order of the court below is correct and should be affirmed.

S. S. Barney,
Attorney for Defendants in Error.

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1 Be it remembered that heretofore, to wit, on the fifteenth day of June, 1893, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a certain transcript of record; which said transcript is in the words and figures following, to wit:

(Duplicate.)

The Territory of New Mexico to the district court of the second judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo, Greeting:

Because in the record and proceedings and in the rendition of judgment in a certain cause, lately pending before you, wherein Joaquin Martin was plaintiff and Atchison, Topeka and Santa Fe Railroad Company was defendant, error has intervened, as it is said, to the damage of the said defendant, and we being willing that such error, if any there be, should be corrected, and speedy justice done in that behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send a copy of the record and proceedings aforesaid to the supreme court of the Territory of New Mexico, together with this writ, so that you have the same in the said supreme court on the first day of the next term thereof, to be begun and held on the last Monday of July, A. D. 1893, at Santa Fé, in said Territory, in pursuance of law.

Witness the Honorable James O'Brien, chief justice of the supreme court of the Territory of New Mexico, and the seal of said court, this 10th day of June, A. D. 1893.

[SEAL.]

H. S. CLANCY, *Clerk.*

2 I, Charles F. Hunt, clerk of the district court of the second judicial district of the Territory of New Mexico, do hereby certify that the foregoing writ of error from the supreme court of the Territory of New Mexico to the said district court of the second judicial district, for the county of Bernalillo, in the case wherein The Atchison, Topeka & Santa Fe Railroad Company is plaintiff in error and *vs.* Joaquin Martin, defendant in error, was lodged in my office, and that the said plaintiff in error on this the 12th day of June, 1893, lodged said duplicate copy of said writ of error in my office, and that prior thereto, on the 31st day of May, 1893, the said plaintiff in error had caused to be lodged in said office the original writ of error, of which the said duplicate is a copy, except as to the date of the issuance of the same; and I further certify that, in accordance with the command of the said writ, I herewith send a copy of the record and proceedings had in said cause in the said district court to the supreme court of the Territory of New Mexico, together with this writ.

Witness my hand and the seal of said district court of the second judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo, on this the 14th day of June, A. D. 1893.

[SEAL.]

CHAS. F. HUNT, *Clerk.*

Be it remembered, that heretofore, to wit: on the 26th day of February, A. D. 1890, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, in and for the county of Bernalillo, in said district, a declaration in a plea of trespass on the case in the words and figures as follows, to wit:

3 TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting within and for the County of Bernalillo, in said District, for the Trial of Causes Arising under the Laws of said Territory, at the May Term, A. D. 1890.

To the Honorable William D. Lee, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof:

Your petitioner, Joaquin Martin, a resident of the county of Bernalillo, in the Territory of New Mexico, complains of the Atchison, Topeka and Santa Fe Railroad Company, a corporation created, organized and existing under the laws of the State of Kansas, and doing business in the Territory of New Mexico, and having its principal place of business in said Territory in Santa Fé, in the county of Santa Fé and Territory of New Mexico, of a plea of trespass on the case.

For that whereas, the said defendant heretofore, to wit: on the 5th day of June, A. D. 1889, at, to wit: the county of Bernalillo aforesaid, was engaged in the operation of a certain line of railroad running through the county of Bernalillo aforesaid, and from El Paso, in the State of Texas, to Atchison, in the State of Kansas, and was the owner of and was using and operating upon the said line of railroad certain trains of cars and locomotive engines propelled by steam power, whereby it became and was the duty of the said defendant to maintain in good repair its said railroad track and road-bed; and for that the said plaintiff was by the said defendant employed as a section hand under the direction of an agent and servant of the said defendant, known as and called a section foreman, which said
4 section foreman of the said defendant plaintiff alleges was not a fellow-servant of the said plaintiff in the same common employment. And plaintiff alleges that he was ordered to go in and upon a car of the said defendant, called a hand car, to a place on the line of the said defendant's railroad track for the purpose of making repair upon the same, and the plaintiff alleges that it thereby became and was the duty of the said defendant, its agents and servants, to use proper and great care in running and operating its railroad trains and locomotive engines propelled by steam power, so as to avoid injury to the plaintiff while he was so engaged in and upon the said hand car in going to the said point to which he had been ordered to go as aforesaid, for the purpose of repairing and putting into proper order and repair the railroad track and road-

bed of the said defendant, but the plaintiff alleges that the said defendant, and its agents and servants who were engaged in the management and operation of one of its railroad trains and trains of cars and locomotive engines propelled by steam power, and which said agents and servants so engaged in the management and operation of the said railroad train and train of cars and locomotive engine propelled by steam power were not, as the plaintiff alleges, fellow-servants of the said plaintiff engaged in the same common employment, did not use proper and great care in the running and operation of the said railroad train, train of cars and locomotive engine propelled by steam power, but on the contrary thereof the plaintiff alleges that the said defendant, its agents and servants, did negligently, recklessly, unskilfully and wantonly, and without the use of proper and great care, so manage, run and operate the said railroad train, train of cars and locomotive engine propelled by steam
5 power that the same was precipitated upon and over the said hand car upon which the said plaintiff was so going and traveling by order of the said section foreman, and while the plaintiff was engaged in obeying the order and directions of the said section foreman, and using due care to avoid accident and injury to himself and to the said hand car, whereby the said plaintiff was violently thrown from the said hand car to the ground and had one of his legs and three of his ribs fractured, and suffered severe contusions of his chest and lungs, and he, the said plaintiff, suffered and sustained great and grievous injuries, and was greatly cut, bruised and wounded, so that his life was despaired of, and he, the said plaintiff, became sick, sore, lame and disordered, and so remained for a long space of time, to wit, from thence hitherto, and has been rendered unable to labor for his support and has become a cripple for life and has been prevented from attending to his affairs and business, and has suffered great pain, and was also by means of the premises obliged to lay out and expend and has laid out and expended a large sum of money, to wit, the sum of one hundred dollars, in and about endeavoring to be healed of the said wounds, sickness and disorder; and has been compelled to lay out and expend and has laid out and expended a further large sum of money, to wit, five hundred dollars in and about the necessary support and maintenance of him, the said plaintiff, and has suffered and sustained other great and serious wrongs, at, to wit, the county of Bernalillo aforesaid, to the damage of the said plaintiff ten thousand dollars.

Wherefore, plaintiff brings this suit and prays judgment
6 against the said defendant for the said sum of ten thousand dollars, his damages, together with interest and costs of suit.

NEILL B. FIELD,
Attorney for Plaintiff.

(Endorsed:) No. 2931. In the district court of the second judicial district, county of Bernalillo. Joaquin Martin *vs.* A., T. & S. F. R. R. Co. Declaration. Filed in my office this 26th day of Feb.,

1890. Chas. F. Hunt, clerk. Neill B. Field, Albuquerque, N. M., attorney for plaintiff.

And thereupon on the same day, to wit: the 26th day of February, A. D. 1890, there was duly issued out of the office of the clerk of said court a summons in the words and figures as follows, to wit:

Summons.

The Territory of New Mexico to the sheriff of Bernalillo county, Greeting:

You are hereby commanded to summon the Atchison, Topeka & Santa Fe Railroad Company to be and appear before the district court for the county of Bernalillo, in the second judicial district of the Territory of New Mexico, on the first day of the next May, 1890, term thereof, to be begun and held within and for said county at the court-house thereof on the second Monday of May, A. D. 1890, then and there to answer unto Joaquin Martin in the plea of trespass on the case; damages ten thousand dollars, with interest and cost of suit; and have you then and there this writ.

7 Witness the Honorable Wm. D. Lee, associate justice of the supreme court of the Territory of New Mexico, and judge of the second judicial district court thereof, and the seal of said district court, this 26th day of February, A. D. 1890.

[SEAL.] CHAS. F. HUNT, *Clerk.*

(Endorsed:) This is an action of trespass on the case for $10,000.00 damages for and on account of personal injuries sustained by the plaintiff while in the employ of the defendant through and by the negligence and recklessness of the said defendant. Amount of damages claimed $10,000.00, together with interest and cost of suit. Chas. F. Hunt, clerk. No. 2931. District court, county of Bernalillo. Joaquin Martin *vs.* A., T. & S. F. R. R. Co. Original summons. Neill B. Field, Albuquerque, attorney for plaintiff.

Which said writ was afterwards, to wit: on the 11th day of March, A. D. 1890, returned to and filed in the office of clerk of said court, with the sheriff's return thereto attached, said sheriff's return and filing mark being in the words and figures as follows, to wit:

I, Jose L. Perea, sheriff of the county of Bernalillo, in the Territory of New Mexico, do hereby certify that I served within summons on the Atchison, Topeka & Santa Fe Railroad Company at my said county of Bernalillo on the 3rd day of March, A. D. 1890, by delivering to Albert Harris, station agent of the said

8 Atchison, Topeka & Santa Fe Railroad Company in charge of its station at Bernalillo, in the said county of Bernalillo, in the said Territory of New Mexico, a true copy of this summons.

J. L. PEREA, *Sheriff.*

Fees.

Service	$1 00
Return	50
	$1 50

Filed in my office this 11th day of Mar., 1890.

CHAS. F. HUNT, *Clerk.*

And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, in and for the county of Bernalillo, in said district, begun and held on the twelfth day of May, A. D. 1890, at the court-house in said county, the following proceedings, among others, were had on the tenth day of the said term, it being the 22nd day of May, A. D. 1890.

Present: The Honorable William D. Lee, associate justice of the supreme court of the Territory of New Mexico, and judge of the second judicial district court thereof, presiding.

JOAQUIN MARTIN *vs.* A. T. & S. F. R. R. Co. } No. 2931.

Now comes defendant and files plea herein, and comes plaintiff and files similiter thereto.

Said plea and similiter being in the words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, *County of Bernalillo.*

In the District Court, May, A. D. 1890, Term.

9 JOAQUIN MARTIN, Pl'ff, *vs.* A., T. & S. F. R. R. Co., Def't. } No. 2931.

And the defendant, by H. L. Waldo and W. B. Childers, its attorneys, comes and defends the force and injury, when, etc., and says that it is not guilty of the said supposed trespasses, above laid to its charge, or any or either of them, in manner and form as the plaintiff has above thereof complained against it. And of this the defendant puts itself upon the country, etc.

H. L. WALDO &
W. B. CHILDERS,
Attorneys for Defendant.

And the plaintiff doth the like.

NEILL B. FIELD,
Att'y for Pl'ff.

(Endorsed:) No. 2931. Territory of New Mexico, county of Bernalillo. Joaquin Martin *vs.* A., T. & S. F. R. R. Co., def't. Plea. Filed in my office this 22nd day of May, 1890. Chas. F. Hunt, clerk. H. L. Waldo & W. B. Childers, att'ys for def't.

And thereafter, upon the twelfth day of the said term, it being May 24th, A. D. 1890, the following proceedings, among others, were had and entered of record, to wit:

JOAQUIN MARTIN
vs.
ATCHISON, TOPEKA & SANTA FE R. R. Co. } No. 2931.

Now comes defendant and files motion for bill of particulars herein.

Said motion for bill of particulars being in the words and figures as follows, to wit:

10 TERRITORY OF NEW MEXICO:

In the District Court, County of Bernalillo, May, A. D. 1890, Term.

JOAQUIN MARTIN, Pl'ff,
vs.
A., T. & S. F. R. R. Co., Def't.

Now comes defendant in the above-entitled cause, by its attorneys, and moves the court for a rule on the plaintiff, requiring him to furnish a bill of particulars, setting forth each item of indebtedness constituting his claim of damages as alleged in his said declaration.

H. L. WALDO &
W. B. CHILDERS,
Attorneys for Defendant.

(Endorsed:) No. 2931. Territory of New Mex., county of Bernalillo. Joaquin Martin *vs.* A., T. & S. F. R. R. Co. Motion for bill of particulars. Filed in my office this 24th day of May, 1890. Chas. F. Hunt, clerk. Waldo & Childers, att'ys for def't.

And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, in and for the county of Bernalillo, in said district, begun and held on the 3rd day of October, A. D. 1892, at the court-house in said county, there was filed in the office of the clerk of said court on the 50th day of the said term, it being the 30th day of November, A. D. 1892, by consent of court, amended declaration in the words and figures as follows, to wit:

Present: The Honorable William D. Lee, associate justice
11 of the supreme court of the Territory of New Mexico, and judge of the second judicial district court thereof, presiding:

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting within and for the County of Bernalillo, in said District, for the Trial of Causes Arising under the Laws of said Territory, at the October Term, 1892.

JOAQUIN MARTIN }
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY. }

Now comes the said plaintiff, by his attorney, and by leave of the court, first had — obtained, amends his declaration heretofore filed in this cause, and complains of the said defendant of a plea of trespass on the case.

For that whereas, the said defendant heretofore, to wit: on the 5th day of June, 1889, at to wit: the county of Bernalillo, in the said Territory of New Mexico, was engaged in the operation of a certain line of railroad running through the county of Bernalillo aforesaid, and from El Paso, in the State of Texas, to Atchison, in the State of Kansas, and was the owner of and was using and operating upon the said line of railroad certain trains of cars and locomotive engines propelled by steam power, whereby it became and was the duty of the said defendant to maintain in good repair its railroad track and road-bed.

And for that the said plaintiff was by the said defendant employed as a section hand under the direction of an agent and servant of the said defendant, known as and called a section foreman, which said section foreman of the said defendant plaintiff alleges was not a fellow-servant of the plaintiff in the same common employment. And plaintiff alleges that he was ordered to go in and upon a car of the said defendant, called a hand car, to a place on the line of the said defendant's railroad track for the purpose of making repairs upon the same, and the plaintiff alleges that it thereby became and was the duty of the said defendant, its agents and servants, to use proper and due care in the running and operation of its railroad trains and locomotive engines propelled by steam power, so as to avoid injury to the plaintiff while he was engaged in and upon the said hand car in going to the said point to which he had been ordered to go as aforesaid for the purpose of repairing and putting into proper order and repair the railroad track and road-bed of the said defendant, but the plaintiff alleges that the said defendant, and its agents and servants who were engaged in the management and operation of one of its railroad trains and trains of cars and locomotive engines propelled by steam power, and which said agents and servants so engaged in the management and operation of said railroad train and train of cars and locomotive engine propelled by steam power were not, as plaintiff alleges, fellow-servants of the said plaintiff engaged in the same common employment, did not use proper and due care in the running and operation of the said rail-

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road train, train of cars and locomotive engine propelled by steam power, but on the contrary thereof, the plaintiff alleges, the said defendant, its agents and servants, did negligently, recklessly, unskilfully and wantonly, and without the use of proper and due care, so manage, run and operate the said railroad train, train of cars and locomotive engine propelled by steam power that the same was precipitated upon and over the hand car upon which the said plaintiff was so going and traveling
13 by order of the said section foreman, and while the plaintiff was engaged in obeying the orders and directions of the said section foreman and using due care to avoid accident and injury to himself and to the said hand car, whereby the said plaintiff was violently thrown from the said hand car to the ground, and had one of his legs and three of his ribs fractured, and suffered severe contusions upon his chest and lungs, and he, the said plaintiff, suffered and sustained great and grievous injuries and was greatly cut, bruised and wounded, so that his life was despaired of, and he, the said plaintiff, became sick, sore, lame and disordered and so remained for a long space of time, to wit: from thence hitherto; and has been rendered unable to labor for his support and has become a cripple for life, and has been prevented from attending to his affairs and business, and has suffered great pain, and was also by means of the premises obliged to lay out and expend and has laid out and expended a large sum of money, to wit: the sum of one hundred dollars, in and about endeavoring to be healed of the said wounds, and has been compelled to lay out and expend and has laid out and expended a large sum of money, to wit: five hundred dollars, in and about the necessary support and maintenance of the said plaintiff, and has suffered and sustained other great and serious wrongs, at, to wit: the county of Bernalillo aforesaid; to the damage of the said plaintiff in the sum of ten thousand dollars.

And for that whereas, also, the said defendant heretofore, to wit: on the 5th day of June, 1889, at, to wit: the county of Bernalillo aforesaid, the said defendant was engaged in the operation of a certain line of railroad running through the county of Bernalillo aforesaid, and from El Paso, in the State of Texas, to Atchison, in the State of Kansas, and was the owner of and
14 was using and operating upon the said line of railroad certain trains of cars and locomotive engines propelled by steam power, and certain hand cars propelled by hand power, for the purpose of transporting its employés and servants and the tools, implements and materials necessary to be used in and about the repair and maintenance of its said railroad track and road-bed; and for that the said plaintiff was by the said defendant employed as section hand under the direction of an agent and servant of the said defendant, known as and called a section foreman, which said section foreman of the said defendant the said plaintiff alleges was not a fellow-servant of said plaintiff in the same common employment; and the plaintiff alleges that it then and there became and was the duty of the said section foreman of the said defendant to direct the

movements of the said plaintiff upon and along the line of the said defendant in and upon a hand car of the said defendant as aforesaid, when the said plaintiff was going to and from the places along the line of said defendant's railroad track designated by said section foreman as his place of labor in his capacity of section hand as aforesaid by and under the direction of the said section foreman as aforesaid, and it then and there became and was the duty of the said defendant, by and through its said section foreman, to use all proper and due care to protect the said plaintiff from danger arising through the operation of locomotive engines and trains of cars propelled by steam power along the line of said defendant's railroad; but, plaintiff alleges, said defendant did not, by and through its said section foreman, use proper or any care to protect the plaintiff from the danger arising through the operation of locomotive engines and trains of cars propelled by steam power along the line of said
15 defendant's railroad, but, on the contrary thereof, the said defendant, through its agent, the said section foreman, did order, command and direct said plaintiff to go in and upon a hand car of the said defendant along the line of the said defendant's railroad at a time and place when and where it was hazardous and dangerous so to do, by reason of the fact that the agents and servants of said defendants were then and there about to pass along the said railroad track with locomotive engines and trains of cars then and there propelled by steam power, which said hazard and danger was and ought to have been well known to the said section foreman and to the other agents and servants of the said defendant engaged in the operation and running of its said trains of cars and locomotive engines propelled by steam power, and was unknown to this plaintiff, and the plaintiff alleges that the said defendant, through its said section foreman, disregarding its said duty in the premises to use proper and due care to protect the said plaintiff from injury as hereinbefore alleged, did order the said plaintiff to go in and upon a car of the said defendant, called a hand car, to a place on the line of the said defendant's railroad track designated by the said section foreman for the purpose of working in his capacity of a section hand, and while the said plaintiff was so going in and upon the said hand car as aforesaid under the direction of the said section foreman so negligently given as aforesaid, and while the said plaintiff was using all due and proper care, the said hand car was struck with great violence by a train of cars and locomotive engine propelled by steam power belonging to and operated by the said defendant, through its servants and agents, which was passing along and upon the line of railroad of the said defendant, whereby the said plain-
16 tiff was violently thrown from the said hand car to the ground, and had one of his legs and three of his ribs fractured and suffered severe contusions upon his chest and lungs, and he, the said plaintiff, suffered and sustained great and grievous injuries and was greatly cut, bruised and wounded so that his life was despaired of, and he, the said plaintiff, became and was sick, sore, lame and disordered, and so remained for a long space of time,

to wit: from thence hitherto, and has been rendered unable to labor for his support and has become a cripple for life, and has been prevented from attending to his affairs and business, and has suffered great pain, and was also by means of the premises obliged to lay out and expend and has laid out and expended a large sum of money, to wit: the sum of one hundred dollars, in and about endeavoring to be healed of the said wounds, sickness and disorder, and has been compelled to lay out and expend and has laid out and expended a further large sum of money, to wit: the sum of five hundred dollars, in and about the necessary support and maintenance of him, the said plaintiff, and has suffered other great and serious wrongs, at, to wit: the county of Bernalillo aforesaid; to the damage of the said plaintiff the sum of ten thousand dollars.

And for that whereas, also, the said defendant heretofore, to wit: on the 5th day of June, 1889, at, to wit: the county of Bernalillo, in the Territory of New Mexico, was engaged in the operation of a certain line of railroad running through the county of Bernalillo aforesaid, and from El Paso, in the State of Texas, to Atchison, in the State of Kansas, and was the owner of and was using and operating upon the said line of railroad certain trains of cars and locomotive engines propelled by steam power, and certain hand cars propelled by hand power, for the purpose of transporting its
17 employés and servants and the tools, implements and materials necessary to be used in and about the repair and maintenance of its said railroad track and road-bed; and for that the said plaintiff was by the said defendant employed as a section hand under the direction of an agent and servant of the said defendant, known as and called a section foreman, which said section foreman of the said defendant was not, the said plaintiff alleges, a fellow-servant of said plaintiff engaged in the same common employment, and the said plaintiff alleges that it then and there became and was the duty of the said section foreman of the said defendant to direct the movements of the said plaintiff upon and along the line of the said defendant in and upon a hand car of said defendant as aforesaid when the said plaintiff was going to and from the places along the line of said defendant's railroad track designated by said section foreman as his place of labor in his capacity of section hand as aforesaid under and by the direction of the said section foreman, and it then and there became and was the duty of the said defendant, by and through its said section foreman, to use all proper and due care to protect the said plaintiff from danger arising through the operation of locomotive engines and trains of cars propelled by steam power along the line of said defendant's railroad; and it also became and was the duty of the said defendant, its agents and servants to use proper and great care in the running and operation of its railroad trains, trains of cars and locomotive engines propelled by steam power, so as to avoid injury to the said plaintiff while he was going to and from his place of labor designated by the said section foreman along the line of the said defendant's railroad in and upon the hand car of the said defendant under the order and direc-
18 tion of the said section foreman; but, plaintiff alleges, said de-

fendant did not use proper and due care to protect him, said plaintiff, from danger arising through the operation of locomotive engines and trains of cars propelled by steam power along the line of the said defendant's railroad, and did not use proper and great care in running and operating its railroad trains, trains of cars and locomotive engines propelled by steam power, to avoid injury to plaintiff while he was going under the direction of the said section foreman to and from the places designated by the said section foreman as the places of labor of him, said plaintiff, as section hand as aforesaid, in and upon a hand car along the line of the said defendant's railroad, but on the contrary thereof, the plaintiff alleges, the said defendant, through its said agent, the said section foreman, did order, command and direct said plaintiff to go in and upon a hand car of said defendant along the line of said defendant's railroad at a time and place when and where it was hazardous and dangerous so to do, by reason of the fact that the agents and servants of said defendant were then and there about to pass along the said railroad track with locomotive engines and trains of cars propelled by steam power, which said hazard and danger were and ought to have been well known to the said section foreman and to the other agents and servants of the said defendant in charge of said train, and was unknown to this plaintiff; and that the said defendant, and its agents and servants who were engaged in the management and operation of one of its railroad trains, trains of cars and locomotive engines propelled by steam power, did so negligently, recklessly, unskilfully, and wantonly, and without the use of proper and great care, run and operate
19 its said railroad train, train of cars and locomotive engines, which said agents and servants so operating said railroad train were not the fellow-servants of said plaintiff engaged in the same common employment, that the said hand car in and upon which the said plaintiff was going as aforesaid under the order of the said section foreman, so negligently given as aforesaid, to the place designated by the said section foreman as the place of labor of him, said plaintiff, as section hand as aforesaid, along the line of said defendant's railroad, was struck with great force and violence by the said railroad train, train — cars and locomotive engine propelled by steam power, so negligently, recklessly, unskilfully and wantonly run and operated as aforesaid by said defendant, through its said agents and servants in charge thereof, whereby the said plaintiff was violently thrown from the said hand car to the ground and had one of his legs and three of his ribs fractured, and suffered severe contusions upon his chest and lungs, and he, said plaintiff, suffered and sustained great and grievous injuries, and was greatly cut, bruised and wounded so that his life was despaired of, and he, said plaintiff, became sick, sore, lame and disordered and so remained for a long space of time, to wit: thence hitherto, and has been rendered unable to labor for his support and has become a cripple for life and has been prevented from attending to his affairs and business, and has suffered great pain, and was also by means of the premises obliged to lay out and expend and has laid out and

expended a large sum of money, to wit: the sum of one hundred dollars, in and about endeavoring to be healed of the said wounds, sickness and disorder, and has been compelled to lay out and expend and has laid out and expended a further large sum of money, to wit: the sum of five hundred dollars, in and about the necessary support and maintenance of him, said plaintiff, and has suffered and sustained other great and serious wrongs, at, to wit, the county of Bernalillo aforesaid; to the damage of the said plaintiff in the sum of ten thousand dollars.

Wherefore, plaintiff brings suit and prays judgment against the said defendant for the said sum of ten thousand dollars, his damages, together with costs of suit.

NEILL B. FIELD,
Attorney for Plaintiff.

(Endorsed:) No. 2931. District court, Bernalillo county. Joaquin Martin *vs.* Atchison, Topeka & Santa Fe Railroad Company. Amended declaration. Filed in my office Nov. 30th, 1892. Chas. F. Hunt, clerk. N. B. Field, att'y for pl'ff.

And thereupon, on the same day, to wit: the 50th day of the said term and the 30th day of November, A. D. 1892, the following proceedings, among others, were had and entered of record, to wit:

JOAQUIN MARTIN
vs.
THE A., T. AND S. F. R. R. CO. } No. 2931. Trespass on the Case.

This cause coming on to be heard, come the parties, by their respective counsel, and come the following jury, to wit: Cosme Lopez, Cristoval Casados, Juan Montoya, Roman Baca, Pablo Sanchez, Anto. Diego Zamora, Peter Quier, Jose Maria Chavez, Jesus Martin, Harvey Knox, Edward Carter, and Domingo Torres, twelve good and lawful men taken from the body of Bernalillo county, chosen, tried, and sworn to well and truly try the matter at issue; the evidence being heard only in part and the hour for adjournment having arrived, the jury, after being instructed by the court as to their duties, are excused until the incoming of court tomorrow morning.

And thereafter, on the fifty-first day of the said term, it being the 1st day of December, A. D. 1892, the following proceedings, among others, were had and entered of record, to wit:

JOAQUIN MARTIN
vs.
A., T. AND S. F. R. R. CO. } No. 2931. Trespass on the Case.

And now again come the parties and again come the jury and the case proceeds.

And thereafter, upon the fifty-second day of the said term, it being the 2nd day of December, A. D. 1893, the following proceedings, among others, were had and entered of record, to wit:

JOAQUIN MARTIN
vs.
A., T. AND S. F. R. R. Co. } No. 2931. Trespass on the Case.

And now again come the parties and again come the jury heretofore empaneled in this cause, and the case proceeds, and the evidence not being completed and the hour of adjournment having arrived, the jury are excused until the incoming of court tomorrow morning, after being instructed by the court as to their duties.

And thereafter, upon the fifty-third day of the said term, it being the 3rd day of December, A. D. 1892, the following proceedings, among others, were had and entered of record, to wit:

22 JOAQUIN MARTIN
vs.
A., T. & S. F. R. R. Co. } No. 2931. Trespass on the Case.

And now again come the parties and again come the jury heretofore empaneled in this cause, and all the evidence being heard, with the arguments of counsel and instructions of the court, the jury retire to consider of their verdict.

And now again come the jury, to wit: Cosme Lopez, Cristoval Casados, Juan Montoya, Roman Baca, Pablo Sanchez, Anto. Diego Zamora, Peter Quier, Jose Maria Chavez, Jesus Martin, Harvey Knox, Edward Carter and Domingo Torres, heretofore empaneled in this cause, and bring into court the following verdict, viz:

"We, the jury, find the issues for the plaintiff and assess his damages at the sum of eight thousand dollars.

"JUAN MONTOYA, *Foreman.*"

And on being asked by the court, "Gentlemen, is this your verdict?" they all answer in the affirmative.

Whereupon, the defendant gives notice of motion for a new trial.

And thereafter, upon the fifty-fifth day of the said term, it being the 6th day of December, A. D. 1892, the following proceedings, among others, were had and entered of record, to wit:

JOAQUIN MARTIN
vs.
THE A., T. & S. F. R. R. Co. } No. 2931. Trespass on the Case.

And now comes defendant and files motion for new trial in this cause.

Said motion for new trial being in the words and figures as follows, to wit:

23 TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

JOAQUIN MARTIN }
vs. } No. 2931.
A., T. & S. F. R. R. Co. }

Motion for New Trial.

Now comes the defendant in the above-entitled cause, by its attorneys, H. L. Waldo and W. B. Childers, and moves the court to set aside the verdict rendered in this cause and grant it a new trial, for the following reasons, to wit:

1st. Because the court refused to sustain defendant's motion to instruct the jury to find a verdict in favor of the defendant and the defendant not guilty, but overruled said motion, to which action of the court defendant then and there excepted.

2nd. Because the court refused to instruct the jury, upon the request of the defendant, to find the defendant not guilty, or a verdict in favor of the defendant, to which refusal the defendant then and there excepted.

3rd. Because the court erroneously instructed the jury, upon the request of the plaintiff; to the giving of each and every one of the said instructions the defendant then and there excepted.

4th. Because the court erroneously instructed the jury, of its own motion, to the giving of which said instructions the defendant then and there excepted.

5th. Because the court, over the objection of the defendant, admitted improper testimony on behalf of the plaintiff and at the instance of the plaintiff in said cause, to the admission of which the defendant then and there excepted.

6th. Because the court refused to admit proper testimony
24 offered by the defendant in its behalf, to the action of the court in excluding which said testimony the defendant then and there excepted.

7th. Because the verdict rendered in behalf of the plaintiff is excessive and the amount of damages as fixed by the jury largely in excess of what would reasonably compensate the plaintiff for the injury received.

8th. Because the said verdict is contrary to the law applicable to said cause.

9th. Because the said verdict is contrary to the evidence admitted in said cause.

10th. Because the said verdict is contrary to both the law and the evidence admitted upon the trial of said cause.

11th. Because the court erroneously permitted said plaintiff to amend his declaration, over the objection of the defendant.

12th. Because the court erroneously refused to continue said cause after permitting the plaintiff to amend the declaration therein, over

the protest of the defendant, thereby compelling the defendant to go to trial without any opportunity to prepare for trial upon the new issue raised in said cause by the amendment made to such declaration.

13th. And for many other good and sufficient causes apparent upon the record of the testimony of the trial of said cause.

H. L. WALDO AND
W. B. CHILDERS,
Attorneys for Defendant.

(Endorsed:) No. 2931. Territory of New Mexico, county of Bernalillo. In the district court, second judicial district. Joaquin Martin, plaintiff, *vs.* A., T. and S. F. R. R. Co., defendant. Motion for new trial. Filed in my office Dec. 6, 1892. Chas. F. Hunt, clerk. H. L. Waldo and W. B. Childers, attorneys for defendant.

And thereafter, upon the sixty-eighth day of said term, it being the 21st day of December, A. D. 1892, the following proceedings, among others, were had and entered of record, to wit:

JOAQUIN MARTIN
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY. } No. 2931.

This cause having been heretofore heard upon defendant's motion for new trial and taken under advisement by the court, and the court now being fully advised doth overrule said motion.

Wherefore, it is ordered and adjudged that plaintiff have and recover of said defendant the sum of eight thousand dollars, together with the costs herein to be taxed, and that execution issue therefor; and comes defendant and files motion for an appeal from the judgment of this court, together with an affidavit in support thereof, which motion for an appeal is granted, and upon motion of said pefendant — is ordered that a supersedeas bond for said appeal may be filed in the sum of sixteen thousand dollars, conditioned as required by law, to be approved by the court.

And thereafter upon the 13th day of February, A. D. 1893, a vacation entry appears of record in the words and figures as follows, to wit:

JOAQUIN MARTIN
vs.
THE ATCHISON, TOPEKA & SANTA FE R. R. Co. } No. 2931.

And now comes the defendant herein and files supersedeas bond as heretofore required, which is accepted by the court.

Said appeal or supersedeas bond being in the words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

Know all men by these presents, that we, W. B. Childers, as principal, and Joshua S. Raynolds and John A. Lee, as his sureties, are held and firmly bound unto Joaquin Martin in the sum of sixteen thousand dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators firmly by these presents.

Signed, sealed and dated this 7th day of February, A. D. 1893.

The condition of the above and foregoing obligation is such that whereas, the Atchison, Topeka and Santa Fe Railroad Company is about to sue out a writ of error from the district court of the second judicial district of the Territory of New Mexico, held in and for the county of Bernalillo, for an appeal from the judgment of said district court of the county of Bernalillo to the supreme court of the Territory of New Mexico, rendered on the 21st day of December, A. D. 1892, in case No. 2931 on the docket of said court, wherein Joaquin Martin was plaintiff and The Atchison, Topeka and Santa Fe Railroad Company was defendant:

Now, therefore, if the said Atchison, Topeka & Santa Fe Railroad Company shall prosecute its said writ of error with due diligence and to final decision in the supreme court of the Territory
27 of New Mexico, and, if the judgment appealed from be affirmed or the said writ of error dismissed, shall perform the judgment of the said district court and pay all damages and costs adjudged against it, then this obligation to be null and void, otherwise to remain in full force and effect.

WILLIAM B. CHILDERS. [SEAL.]
JOSHUA S. RAYNOLDS. [SEAL.]
JOHN A. LEE. [SEAL.]

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

Before me, the undersigned authority, on the 7th day of February, A. D. 1893, personally came and appeared Joshua Raynolds and John A. Lee, whose names are signed to the above and foregoing bond as parties thereto, who, each for himself, acknowledged to me that he had voluntarily executed the same for the purpose therein mentioned, and that the same was his act and deed.

[SEAL.] In witness whereof, I have hereunto set my hand and official seal, the day and year last above written.

E. L. MEDLER,
Notary Public.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

Joshua Reynolds and John A. Lee, sureties on the above and foregoing bond, having been severally sworn according to law, each upon his oath says that he is worth the sum set opposite to his name below, in property situate in said Territory, over and above

all his just debts and liabilities and property exempt from execution and forced sale.

JOSHUA S. REYNOLDS.
JOHN A. LEE.

Joshua Reynolds	$8,000 00
John A. Lee	8,000 00

28 Subscribed and sworn to before me this 7th day of February, A. D. 1893.

[SEAL.] E. L. MEDLER,
Notary Public.

Examined and approved by me this 13th day of February, 1893.

WM. D. LEE,
Associate Justice, &c.

Approved by me this 23d day of March, 1893.

[SEAL.] H. S. CLANCY,
Clerk Supreme Court of New Mexico.

(Endorsed:) No. 2931. Territory of New Mexico, county of Bernalillo. In the district court, second judicial district. Joaquin Martin, plaintiff, *vs.* A., T. and S. F. R. R. Co., defendant. Appeal bond. Filed in my office Feb. 13, 1893. Chas. F. Hunt, clerk. H. L. Waldo and William B. Childers, attorneys for def't.

And thereafter, upon the 23rd day of March, A. D. 1893, there was issued out of the office of the clerk of the said court, per request of the plaintiff in the aforesaid cause, an execution, said execution being — the words and figures as follows, to wit:

The Territory of New Mexico to the sheriff of Bernalillo county, Greeting:

You are hereby commanded, that of the goods and chattels, lands and tenements of Atchison, Topeka and Santa Fe Railroad Company in your county, you cause to make the sum of eight thousand dollars damages, and fifty-eight and $\frac{40}{100}$ dollars cost of
29 suit, which by the judgment of our district court within and for the county of Bernalillo and Territory aforesaid, at the October term thereof, A. D. 1892, Joaquin Martin recovered against the said Atchison, Topeka and Santa Fe Railroad Company, with interest thereon from the 21st day of December, A. D. 1892, until paid, at the rate of six per cent. per annum, and also the costs that may accrue; and due return make of your proceedings on this writ before our said district court within sixty days from the receipt hereof, to render, etc.; and have you then and there this writ.

Witness the Hon. William D. Lee, associate justice of the supreme court of the Territory of New Mexico, and judge of
[SEAL.] the second judicial district court thereof, and the seal of said district court this 23rd day of March, A. D. 1893.

CHAS. F. HUNT, *Clerk.*

(Endorsed:) No. 2931. District court, county of Bernalillo. Joaquin Martin *versus* A., T. & S. F. R. R. Co. Execution. Neill B. Feild, attorney for plaintiff.

Sheriff levy and collect:

Damages	$8,000 00
Costs—	
Clerk	12 90
Sheriff	11 00
Witness	34 50
Total	$8,058 40

30 with interest at six per cent. per annum from Dec. 23rd, 1892, and your collection fees.

CHAS. F. HUNT, *Clerk.*

Which said execution was afterwards, on the 19th day of May, A. D. 1893, returned to and filed in the office of the clerk of said court, with the sheriff's return endorsed thereon, said return and filing mark being in the words and figures as follows, to wit:

I hereby return this writ by order of the district court in and for Bernalillo county, Territory of New Mexico, May 19th, 1893.

J. YRISARRI, *Sheriff,*
By J. S. GARCIA, *Deputy.*

Filed in my office May 19th, 1893.

CHAS. F. HUNT, *Clerk.*

And thereafter, upon the 19th day of April, A. D. 1893, there was filed in the office of the clerk of said court a motion by defendant in the words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court, Second Judicial District.

JOAQUIN MARTIN }
vs. }
ATCHISON, TOPEKA & SANTA FE R. R. Co. }

Now comes the defendant in the above-entitled cause and moves the court to quash the execution heretofore issued therein, and now in the hands of the sheriff, and to recall the same from the hands of said sheriff for the following reasons, to wit:

31 1st. Because the execution in said cause was improperly issued, the same having been ordered stayed by the court upon filing bond in double the amount of said judgment, which said bond was filed by the defendant in said cause.

2nd. Because the defendant has filed a bond in said court to

supersede the said judgment, which said bond has been approved by the clerk of the supreme court, said bond having been filed within ninety days after the overruling of the defendant's motion for a new trial therein.

H. L. WALDO AND
W. B. CHILDERS,
Attorneys for Defendant.

(Endorsed:) No. 2931. Territory of New Mexico, county of Bernalillo. In the district court, second judicial district. Joaquin Martin, plaintiff, *vs.* A., T. & S. F. R. R. Co., defendant. Motion. Filed in my office April 19th, 1893. Chas. F. Hunt, clerk. H. L. Waldo and William B. Childers, attorneys for defendant.

And thereafter, upon the 25th day of April, A. D. 1893, there was filed in the office of the clerk of said court a motion by defendant in the words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo, }

In the District Court.

32 JOAQUIN MARTIN }
vs. } No. 2931.
A., T. & S. F. R. R. Co. }

Now comes the defendant in the above-entitled cause, and, having filed bond within ninety days as required by law, and the same having been approved by the clerk, moves the court to grant an order of supersedeas in said cause.

H. L. WALDO AND
W. B. CHILDERS,
Attorneys for Defendant.

(Endorsed:) No. 2931. Territory of New Mexico, county of Bernalillo. In the district court, second judicial district. Joaquin Martin, plaintiff, *vs.* A., T. & S. F. R. R. Co., defendant. Motion to grant order of supersedeas. Filed in my office April 25th, 1893. Chas. F. Hunt, clerk. H. L. Waldo and W. B. Childers, attorneys for defendant.

And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, in and for the county of Bernalillo, in said district, begun and held on the 6th day of March, A. D. 1893, at the court-house in said county, the following proceedings, among others, were had and entered of record on the 44th day of the said term, it being the 25th day of April, A. D. 1893.

Present: The Honorable Wm. D. Lee, associate justice of the supreme court of the Territory of New Mexico, and judge of the second judicial district court thereof, presiding:

33 JOAQUIN MARTIN
vs.
ATCHISON, TOPEKA & SANTA FE R. R. Co. } No. 2931.

This cause coming on to be heard upon the defendant's motion to quash the execution issued in the said cause, also application of said defendant for an order granting supersedeas, and after arguments of counsel for the respective parties, the court doth take the same under consideration.

And thereafter, upon the fifty-sixth day of the said term, it being the 9th day of May, A. D. 1893, the following proceedings, among others, were had and entered of record, to wit:

JOAQUIN MARTIN
vs.
ATCHISON, TOPEKA & SANTA FE R. R. Co. } No. 2931.

The court having taken under advisement defendant's motion heretofore filed and made in said cause to quash the execution issued therein, and now in the hands of the sheriff, and after having heard arguments of counsel and being fully advised in the premises, doth sustain said motion, and it is hereby ordered that the said execution in the hands of said sheriff be quashed, and the same is hereby recalled from the hands of said sheriff.

And thereafter, upon May 11th, 1893, there was filed in the office of the clerk of said court a motion to set aside order quashing execution, &c., in the words and figures as follows, to wit:

In the District Court of Bernalillo County, New Mexico.

JOAQUIN MARTIN
vs.
ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY. }

To said defendant and its attorneys:

34 Take notice that said plaintiff will move the court, on Saturday morning, May 13, 1893, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, to set aside the order heretofore entered in this cause quashing the writ of *fieri facias* issued therein, for reasons stated in his motion on file, a copy of which is hereto attached.

NEILL B. FIELD,
Attorney for Plaintiff.

Received a copy of the said motion to set aside order quashing execution and a copy of the foregoing notice this 11th day of May, 1893.

H. L. WALDO,
W. B. CHILDERS,
Attorneys for Defendant.

In the District Court of Bernalillo County, Territory of New Mexico, at the March Term, 1893.

JOAQUIN MARTIN
vs.
ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY. } Trespass.

Now comes the plaintiff, by his attorney, and moves the court to set aside the order quashing the writ of *fieri facias* heretofore issued in this cause for the following reasons:

1st. Because the said order was made upon a ground not assigned in the motion to quash the said writ, and not presented in argument to the court, and upon which plaintiff has not been heard by his counsel.

2nd. Because the court had no power to quash the said writ for the reason assigned in the court's opinion on file, and the said order was improvidently granted.

3rd. Because no stay of execution was ordered by the court and no writ of supersedeas was ever issued, and because the action of the court, in granting the appeal, so called, if valid until reversed, did not amount in law to a stay of execution or supersedeas.

35 4th. Because the court, in quashing the said execution, has violated the plain statutory rights of the plaintiff, and has interposed to prevent the execution of the judgment, without authority of law.

5th. Because, admitting the validity of the order of the court, allowing the defendant to file a supersedeas bond, and that supersedeas granted by the court, at the same term, even, without authority of law, would be good until reversed, no such order was ever made, either in term time or at any other time.

NEILL B. FIELD,
Attorney for Plaintiff.

(Endorsed:) No. 2931. In the district court of the second judicial district, county of Bernalillo. Joaquin Martin *vs.* A., T. & S. F. R. R. Co. Motion to set aside order quashing, etc. Filed in my office May 11, 1893. Chas. F. Hunt, clerk. Neill B. Field, Albuquerque, N. M., attorney for pl'ff.

And thereafter, upon the sixty-fifth day of the said term, it being the 19th day of May, A. D. 1893, the following proceedings, among others, were had and entered of record, to wit:

JOAQUIN MARTIN
vs.
ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY. } No. 2931. Trespass on the Case.

This cause having been heretofore heard upon plaintiff's motion to vacate the order of court heretofore made quashing execu-

36 tion herein, and taken under advisement, and the court, now being fully advised, doth order that said motion be and the same is overruled.

And thereafter there was filed in the office of the clerk of the said court a bill of exceptions in the words and figures as follows, on the 27th day of May, A. D. 1893, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico in and for the County of Bernalillo.

JOAQUIN MARTIN
vs.
ATCHISON, TOPEKA & SANTA FE R. R. Co. } No. 2931.

Notice.

To the above-named plaintiff and his attorney, Neill B. Field, Esq.:

You are hereby notified that the defendant in the above-entitled cause will present to the judge of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, before whom said cause was tried, for his approval and signature, a proposed bill of exceptions, and that said bill of exceptions will be so presented to the said judge, and the signing and sealing of the same asked for, at his chambers in Albuquerque, on Tuesday, the 16th day of May, A. D. 1893.

H. L. WALDO AND
W. B. CHILDERS,
Attorneys for Defendant.

Service of copy of above notice acknowledged this 11th day of May, A. D. 1893.

NEILL B. FIELD,
Attorney for Plaintiff.

37 In the District Court of the Second Judicial District of the Territory of New Mexico, Held in and for the County of Bernalillo.

JOAQUIN MARTIN
vs.
ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY. } No. 2931.

Be it remembered, that on the trial of this cause the following proceedings were had, and the plaintiff gave in evidence the testimony of witnesses, and objections were made and acted upon by the court, and exceptions filed as hereinafter follows, that is to say:

Trial.

October, 1892, Term, District Court, Bernalillo County.

JOAQUIN MARTIN
vs.
ATCHISON, TOPEKA & SANTA FE RAILROAD CO. } No. 2931.

Mr. Neill B. Field appears for the plaintiff.

Messrs. W. B. Childers and H. L. Waldo appear for defendant company.

Jury called and empaneled, and sworn, without exception having been taken.

Mr. Field, on behalf of the plaintiff, invoked the rule, and the witnesses, receiving the instructions of the court, were excluded from the court-room.

Mr. Field made an opening statement of the plaintiff's case to the jury.

(Mr. Thos. B. Montoya interpreting.)

JOAQUIN MARTIN.

The plaintiff, JOAQUIN MARTIN, being duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. What is your name?

A. Joaquin Martin.

Q. What is your age?

38 A. I believe I am thirty-nine years old.

Q. How were you employed in the month of June, 1889?

A. I was working for the company.

Q. What company?

A. The Atchison, Topeka and Santa Fe.

Q. In what business is that company engaged?

A. I was employed at the hand car.

Q. What is the business of the Atchison, Topeka & Santa Fe Railroad Company?

A. Fixing the road and straightening out the rails and fixing ties wherever they are required.

Q. Well, what does the railroad company do? Does it run trains or cars or what?

A. Yes, sir; it runs cars.

Q. Who employed you to work for the Atchison, Topeka & Santa Fe Railroad Company?

A. The foreman.

Q. The foreman of what?

A. John Smith.

Q. What was he foreman of?

A. To work on the road and fix the road.

Q. What were your wages?
A. Mine?
A. Yes, sir.
A. A dollar ten.
Q. For what length of time? For a month, a year, or how?
A. By months.
Q. A dollar and ten cents a month?
A. No, sir; a day.
Q. How long had you been at work for the Atchison, Topeka & Santa Fe Railroad Company prior to the accident about which this suit is brought?
A. I was going on three months, working.
39 Q. Had you been employed under the same section foreman all that time?
A. Yes, sir.
Q. How many other men were employed on that same section beside yourself?
A. I and Donaciano Mares, and sometimes they used to employ men when they had a great deal of work to do.
Q. What were your duties, what were the duties of Mares, and from whom did you receive your orders?
A. From the section foreman.
Q. What did you do; what were your duties as section hand there?
A. My duties were to do what my foreman told me to do.
Q. Well, now, if your foreman told you to do anything on the fifth day of June, 1889, state when it was and all about it, what he told you and what you did.
A. On the morning of the 5th of June, 1889, I left home at six o'clock for my work; on the way I met my associate on his way to work. We reached the section—the section-house, and we stayed there to await the customary hour; it lacked—it must have lacked two minutes of the hour when the section foreman came in and said, "Come on, boys, let us take out the tools. Let us go quick, so we can get back by half past five in the evening." We went toward the north, and we reached a little house and stopped there—stopped the car and filled the tank full of water, when we put the barrel of water in the car. Just as we were going out on the car, my associate told the section foreman, "John, it looks as though the train is moving out the depot"——
Mr. WALDO: We object to this, your honor. We have no objection to his establishing the fact of the conversation between
40 the section foreman and this man, but I gather from the tendency of this question and from the tendency of Mr. Field's remarks in his opening statement that he is going to show that the section foreman spoke in regard to this train, not to have any apprehension of the train, &c. Assuming that the law is as Mr. Field contends it is: that this section foreman is his superior officer, &c., still if he is going to show that that man was negligent in regard to this man here by telling him that this train was coming, we object, because he has not charged negligence on the part of

the section foreman, the substance of his action being the negligence on the part of the trainmen.

Mr. FIELD: If I have limited the negligence I have charged here, I want to get rid of the limitation as quickly as I possibly can.

Mr. WALDO: If you do, the case must go over the term.

Mr. FIELD: Not unless you are surprised.

Mr. WALDO: We are surprised.

Mr. FIELD: I will read the declaration and see if I have not alleged it. (Reads.) Your honor, I ask leave to amend this declaration by inserting in it after the words, "the plaintiff was engaged in obeying the orders and directions of the said section foreman," the words: "it then and there being the duty of the said section foreman to use all due and proper care to protect the said plaintiff from injury while so employed," and, at the place, "upon the said hand car," by inserting the following: "The said section foreman then and there failed and neglected to use due care in and about the orders then and there given by the said section foreman to the said plaintiff, and the section foreman was then and there guilty of gross negligence in ordering the plaintiff to go in and upon the said hand car at a time when the said railway track of the
41 defendant was about to be passed by a train of cars then and there belonging to the said defendant."

Mr. WALDO: There is no question that the gentleman has the right to amend his declaration, but the effect of it will be to continue the case. We say that his declaration does not allege any negligence on the part of the foreman, and we prepared our case for trial on the basis that it was on account of the negligence of the trainmen, and we are not prepared to go ahead with the kind of a case he now wishes to make.

Mr. FIELD: If your honor wants the case to go over, I have no objection, but they must make a legal showing, I think. I propose to try the case on the merits and not on any declaration, and if the gentlemen wish a continuance I shall want an affidavit showing that some material witness is absent.

Mr. WALDO: I cannot make any such an affidavit, because I have not investigated the case with that view. I prepared the case purely on the pleadings as they stand.

Mr. FIELD: I do not wish to try the case on any technicality——

Mr. WALDO: I am different from Mr. Field; I propose to try railroad cases upon technicalities; we are forced to do it.

The COURT: There is no question that the statute gives the right to the amendment, and there is no question that the declaration does not set out negligence on the part of the section boss, but alleges it on account of the train. So far as the rulings which might be made are concerned the amendments are material ones, and the only question is whether the amendments shall have the effect of postponing the trial of the case. The company should make some showing as to their reasons for not being able to meet that
42 part of the plaintiff's case. It is now nearly the hour for the noon recess and at 2 o'clock you can have some authorities

here on this point. The amendment is important, and I suppose Mr. Field insists on it.

Mr. FIELD: Yes, sir; I insist on the amendment to the declaration.

Judge WALDO: The only showing I can make is that I came here prepared to go to trial on the pleadings as they stand. It will be a manifest injustice to be forced into trial now.

The COURT: That is the showing you should make. You might show that you have not all the witnesses you could get.

Mr. WALDO: We do not know whether we have or not.

The COURT: Then the fact that you do not know that is a showing.

Mr. WALDO: I apprehend that the statement of the attorney is enough.

Mr. FIELD: My proposition is that it devolves on the company to show prejudice, and not possibility of prejudice, to it. If Judge Waldo says he knows of any witness that the company could have had here that he has not got here now, I will consent to the continuance, but the mere suggestion that somewhere or other there might be a witness I do not think is sufficient.

The COURT: I will hear you on this question this afternoon.

(Recess.)

The court listens to the arguments of counsel on the motion for continuance.

Mr. WALDO: I wish to state on the record that this case has been pending for three years on these pleadings as they now stand, and we had the right to suppose that Mr. Field had chosen his
43 ground upon which to bring his action, and it having rested so long in that form of action we prepared to try this cause upon that theory, and secondly, we say that the introduction of the amendment into this pleading, which he seeks to make as dictated to the stenographer injects entirely new issue into the case, and we are entitled to have an opportunity to investigate these facts and see what they are. For these reasons we say that if these amendments are allowed, it should be only on the terms that the case is continued, in order that we may investigate the facts which the new pleadings raise.

The court, in a lengthy opinion, granted the plaintiff the right to amend and overruled the defendant's motion for a continuance.

Mr. WALDO: We want to object to the amendment and except to the ruling of the court.

The COURT: You have that right. The ground on which I have ruled is that there is no showing on the part of the defendant that it has been taken by surprise and that it cannot have just as fair and impartial a trial as if the amendment had not been made.

Mr. WALDO: We want an exception to the amendment for the reason that the amendment that has been offered tenders a new issue upon which—in the proof of which, a different state of facts are required.

The COURT: You may take that exception.

Mr. WALDO: The defendant moves that the case be continued for the term.

Mr. FIELD: I suppose that for the purposes of the case the amendment may be considered as made and that I may put it in form upon the record tomorrow.

Mr. WALDO: We want to plead to it, of course.

Mr. FIELD: I claim there is no necessity for any additional plea.

44 The COURT: The rule is that he may have the right to plead to it.

Mr. WALDO: We must plead to it. Our plea to this as it stands is not good to the declaration as amended.

Mr. FIELD: Shall we suspend the trial?

The COURT: We can proceed with the case and the defendant can file its plea.

Mr. FIELD: I will prepare an amended declaration which shall be presented as though at the time of this ruling, and file the same.

The COURT: I think you should make your amendment now.

Mr. WALDO: We want to file our plea.

Mr. FIELD: I will consent upon the record that the amendment shall be considered as proposed upon the record, if the gentleman wishes, though I want to prepare an amendment which will substantially set forth the thing which I stated here: negligence on the part of the section foreman, and I will do so as soon as there is an adjournment of the court.

Direct examination by Mr. FIELD continued:

Q. At the time this objection arose you were proceeding to state something about a conversation with the section foreman; go on now and state it.

A. I think we were just at the house where we filled the barrel with the water and we put the barrel of water on the hand car and we went further north and we got on the hand car. I and my associates stood in front, and as I turned my head south—as I was about to—the foreman told me to turn my head north—my face, and we went north. When we had traveled about fifty yards——

Q. You have not stated what you were about to state with reference to the conversation with the section foreman when you were interrupted.

45 A. I do not understand what you mean to say by that.

Q. When you were interrupted you stated that when you were about to put the barrel of water on the hand car Donaciano said something to the section foreman, but you did not state what it was; now tell it.

A. When we put the barrel of water on top, Donaciano told the foreman, "Mr. Jones, it seems as though they are moving a train at the depot," and the foreman told him, "This is not train time, let us go to work." We got on and I got on in front, and I was facing south and he made me turn my face north, and we traveled north. When we had traveled about five hundred varas from the

place where we filled the barrel full of water the train overtook us. It struck the train where we were and turned it over on us. I fell at the end of the flat of the hand car in front; I fell on top of the flat; it raised me with the hand car and onto the flat.

Mr. CHILDERS: It raised him?
INTERPRETER: It threw him right on top of the hand car.

Ans. cont. Then I kind of pulled my leg as the train was moving, and a little lower I saw my associate right back of me, and I told him, "Friend, they killed us," and then the train got off the track and then they stopped it, and then some men came and they put me on the meadow there and then they raised the train on the track again. Then the same men came and raised me again and put me in the caboose and took me to the depot; at the depot came my brothers and my father for me, my parents, and they took me home.

Q. Were you hurt?
A. Yes, sir.
Q. How; to what extent, I mean?
A. The leg here is broken; badly hurt.
46 Q. What else, if anything?
A. It hurt me from inside so that I cannot sleep on that side (left side).
Q. What did you do?
A. A few days after I sent for Don Santiago Baca.
Q. How long were you in bed? never mind about Don Santiago.
A. I was lying with my face upwards for two months and 27 days. The doctor fixed my bed so that my feet were higher than my head and tied a machine to this leg by means of which he pulled it.
Q. Did you suffer any?
A. A great deal.
Q. For how long?
A. Up to date, I am still suffering.
Q. What, if any, has been the effect of that injury upon your capacity to labor?
A. I cannot work.
Q. What is the length of the injured leg with reference to the other leg, or to its former condition?
A. That this is shorter than the other one.
Q. Which is shorter than the other?
A. This sick leg; the left leg (showing).
A. Was that in that condition before this 5th day of June, 1889?
A. In the morning they were equal. At six o'clock that morning they were well.
Q. What was your physical condition prior to this accident? Were you a strong and well man or a sick and weak man?
A. Yes, sir; I was well and good.
Q. And how have you been since this accident?
A. Very weak.

Q. What if anything have you been able to do to earn a livelihood since this injury?

47 A. I have endeavored to obtain work from some of my friends but I have not done any work.

Q. State whether or not you would have been able to work if you could have obtained it?

A. No, sir; under no circumstances—in no way.

Q. What knowledge or information had you about the approach of that train prior to the time it struck the hand car?

A. I had not any knowledge of it.

Q. Describe to the jury how the hand car was operated, and what, if any, noise was made by the operation of the hand car.

A. We used to manage it by the machine; we would take hold of it from that side (indicating).

Q. Describe it to the jury with your cane.

A. One would take it from this side and the associate would take it from this other side, and we used to work it so that it would go faster than a horse, I think.

Q. How was it running on this occasion?

A. Very fast.

Q. Did you, or not, see the train before it struck you?

A. No, sir; I did not see it until it struck us.

Q. Well, now, describe exactly what happened to you when it struck you.

A. Why, it flew upwards and fell on the flat.

Q. What fell on the flat?

A. Myself and Donaciano.

Q. What became of the hand car?

A. I do not know.

Q. Did you see the train after you were hurt?

A. They took me away immediately.

Q. What was the position of that train when you saw it?

48 A. I cannot describe it because I fainted a little.

Q. State whether or not it became necessary for you to have anybody to take care of you while you were in bed.

A. The doctor.

Q. Anybody else?

A. My relatives.

Q. Whom did you have to take care of you? What was necessary in that regard?

A. My sisters, brothers and the doctor took care of me.

Q. How long?

A. Up to date; my brothers still take care of me.

Q. How long did you remain in bed?

A. Two months and twenty-seven days, I was in my bed without moving.

Q. How much longer did you stay in bed after that, if at all?

A. I must have stayed in my bed before I went to town about the same length of time, but I could move about inside sometimes.

Q. Could you walk without artificial means—a crutch, or cane or something of that kind?

A. No, sir. I had crutches.
Q. How long did you have crutches?
A. I must have had them about a year.
Q. Since that time have you been able to walk without artificial assistance?
A. I walk with my cane.
Q. Is the cane necessary to enable you to walk, or not?
A. I do not walk very comfortably with it, because I need another a little stronger, but I can walk with it.
Q. Where was this accident?
A. Near Albuquerque.
49 Q. And when?
A. In the year 1889, on the 5th day of June.
Q. And whose train of cars was this that struck the hand car and injured you?
A. Of the Atchison, Topeka & Santa Fe.
Q. Do you know who was in charge of that train?
A. No, sir.
Q. When you say the Atchison, Topeka & Santa Fe, do you mean the Atchison, Topeka & Santa Fe Railroad Company, the defendant here?
A. Yes, sir.

Cross-examination by Mr. W. B. CHILDERS:

Q. You say you went to the railroad station that morning at six o'clock?
A. Yes, sir; about half past six or six forty-five.
Q. What time did you leave the station with the hand car?

Mr. FIELD: I object to the question, for the reason that the witness did not say the hand car left the station, but that it left the section-house.
Mr. CHILDERS: I do not limit it to the depot building; I suppose the section-house is part of the station.

Q. Where was the hand car when you first took it?
A. At the section-house—at the small house.
Q. On the station grounds, is that house?
A. I understand it is on the station grounds.
Q. It is there where the switches are, is it not?
A. A little bit further that way from the switches.
Q. It is between the switches?
A. No; it is not between the switches; it is a little in front of the switches.
Q. What time did you take the hand car from the section-house?
A. About seven o'clock in the morning.
50 Q. And you took it up the track to a place where you got some water in a barrel?
A. Yes, sir.
Q. What did the section boss say to you about going out that morning?

A. To my associate he said it; he interpreted it to me.

Q. What did he say?

A. Take out the hand car and the tools, and that we are going to return by about half past five.

Q. Did you see any train there at that time at the depot?

A. Yes, sir; there were many trains I saw at the depot.

Q. Where were you going to work?

A. I did not see any.

Q. Where were you and your companion and the section boss going to work that day?

A. Towards the north.

Q. How far north were you going?

A. About eight or nine miles.

Q. About Alameda somewhere?

A. About Alameda.

Q. What kind of work were you going to do there when you got there?

A. I do not know what work.

Q. What kind of work were you going to do there?

A. The foreman used to tell us what kind of work we should do.

Q. You were going to work for the railroad company, were you not?

A. Yes, sir.

Q. You were going to do some work on the track?

A. Yes, sir.

51 Q. And that is the kind of work you did every day, is it not?

A. Yes, sir. We were working there.

Q. You and your companion and the section boss worked there and ballasted the track and put in the ties, and did everything to keep the track in repair.

A. Yes, sir; to keep the track in order.

Q. All three of you were working for the railroad company?

A. Yes, sir.

Q. Now how far is this place where you got the water from the section-house?

A. The place where we started with the hand car to the place where we put the water on must be about between three and four hundred yards.

Q. Who worked the crank of the hand car going up to that place?

A. Myself and my associate and the foreman.

Q. How were you standing; with your faces to the north?

A. Yes, sir.

Q. The both of you?

A. Yes, sir.

Q. Now after you put the water on what did you do? Did you go on straight up the track?

A. Yes, sir.

Q. Where were you when that conversation took place about the train?

A. We were going on the hand car.
Q. At the place where you took the water?
A. Yes, sir; at the place where we put the water on the hand car. We got the water from the pump.
Q. That is where the conversation occurred about the train?
A. Yes, sir.
52 Q. Now who spoke about the train?
A. Donaciano Mares.
Q. In what language did he speak?
A. In Spanish, he spoke to the foreman.
Q. Did the foreman understand Spanish?
A. No, he did not understand it, but some words he understood.
Q. Now, what did he say to him?
A. He interpreted to me what he had said. My associate told me this man don't want to stop, a train is moving in front.
Q. You say that your companion spoke to him in Spanish?
A. He says: "Mr. John, I think a train is moving at the depot."
Q. I am not asking you what he said. I am asking you now in what language Donaciano Mares spoke to the section foreman.
A. I am telling you that he spoke to him in Spanish.
Q. Now, in what language did the section foreman reply?
A. In English, or in German; I did not understand it.
Q. You did not understand it yourself?
A. No, sir; my associate interpreted it.
Q. The only way that you know what the section foreman said was from what Donaciano Mares told you?
A. Yes, sir.

Mr. CHILDERS: We ask the court to strike out the testimony as to what the section foreman said. The other man, Donaciano Mares, is here, and he is the witness to prove this fact.
The COURT: The statement of what the other man said the foreman told him would not be evidence.
53 Mr. FIELD: I would like to be heard on the question for a moment. It seems to me that what was said there is competent evidence here as a part of the *res gestæ*, and that it is not hearsay evidence, and it is certainly entitled to go to the jury as having been said by Donaciano Mares to the witnesses as what the section foreman said to him.
The COURT: The testimony as to what the foreman said is withdrawn from the jury, it appearing from the testimony of the witness that he only knew it through the interpretation of Donaciano Mares, as to what the section foreman said, and did not himself understand what was said.
Mr. FIELD: The plaintiff objects upon the ground that it is not sought to give evidence of what the section foreman said in this manner, but only to give evidence of what Donaciano Mares said to the witness what the foreman said, as a part of the *res gestæ* of the transaction.
The court overruled the objection.
Mr. FIELD: The plaintiff excepts.

Mr. CHILDERS: I ask the court to instruct the jury that all the testimony in regard to that conversation, whether testified to at this time or elsewhere in his testimony, is withdrawn from their consideration.

The COURT: All that is shown to come from the foreman through the interpreter to the witness will be stricken out. All that he obtained through the interpreter is stricken out.

Mr. FIELD: I except to the action of the court in arguing the gentlemen's case to the jury. If testimony has gone into this case without exception and objection, and it afterwards appears by cross-examination that it was objectionable, the proper method is not, as I understand the practice, to withdraw the objectionable
54 testimony from the jury, but to leave it as a matter of argument for counsel.

Mr. CHILDERS: We do not so understand the practice. Whenever it appears that testimony is incompetent we may move to strike it out.

Mr. FIELD: I understand the court has ruled with you and I except.

The COURT: Gentlemen, in regard to the testimony taken from your consideration, I refer only to the testimony which was received by the witness through the interpreter, Donaciano Mares.

Cross-examination continued:

Q. Now, you say you sat with your face to the north?

A. I stood.

Q. Did you sit down or stand up to work the hand car?

A. We stand up.

Q. How did you usually stand; both on the same side, or not?

A. One on the one side, and the other on the other.

Q. That is the way you always stood before that? One on one side of the car facing south, and the other one on the other side facing north. That is the way you stood on the hand car every day before this; did you not?

A. We used to manage it according to the orders from the section foreman.

Q. But as a matter of fact, didn't you—if there were two of you in the hand car, didn't you stand on one side and the other man on the other side, facing each other?

A. We used to manage it just according to the orders of the section foreman.

55 Q. I am not asking you whether you did it according to the orders of the section boss or not, but I am asking you whether it was not the fact that for all the time before this, generally——

Mr. FIELD: I object to the question as not proper cross-examination. It does not make any difference how they handled the car before this.

The court overruled the objection and the plaintiff excepted.

Q. Is it not a fact that generally you stood as I have asked you, when you were working this car; one of you facing in one direction and the other facing in the opposite direction?

A. I am answering you that we managed it just according to the orders of the foreman; when he used to order us to have our faces that way, we used to have them that way, and when he ordered us to face each other we would have them that way.

Q. How often did he tell you to stand with your faces in one direction?

A. Whenever he pleased. He was the boss.

Q. How often did he please?

A. That morning he told us.

Q. I am talking about before that?

A. I cannot remember the times that he ordered us to go that way.

Q. How often?

A. I do not remember.

Q. Did he ever do it six times before that morning?

A. I do not know.

Q. You do not know whether he ever did it as many as six times, or not?

A. I could not say before that morning whether he had ordered us six, ten or twenty times, but he told us to go that way that morning.

56 Q. Now, how many years had you worked on this hand car, on this section?

Mr. FIELD: He said three months.

Q. How many months did you say you worked on this hand car?

A. I understand that I had been there three months working.

Q. Now, this hand car is worked by a crank is it not, which is located in the middle of the car?

A. When we put it there; yes, sir.

Q. That is where it is when you are working the hand car, is it not?

A. No, sir; it is not there; when we put it there, then it is there.

Q. Is it not a fact that there is a crank which goes down in the middle of the car and goes under the car, and that you have a cross-piece here (demonstrating with books) and there are two handles like that which you work up and down in this fashion?

—. ——.

Q. Is not that in the center of the car?

A. Yes, sir; in the middle of it.

Q. And the handles are long enough for four men to work at it?

A. Yes, sir; and even six men can work on it.

Q. Now you say that the section foreman told you and Donaciano Mares to take care of the crank on the same side, with your faces facing to the north?

A. The same side of what? Where?

Q. Both of you had hold of the same handle?

A. Yes, sir.

Q. This way (demonstrating with cane)?

A. Yes, sir.

Q. And he told both of you to take care of the same handle on the south end of the car?

A. We were on the north side.

57 Q. On the north side of the car?

A. Yes, sir; we were in front, and the foreman was behind it.

Q. If you were on the front side of the car you were facing the south, were you not?

A. We were facing north.

Q. Then you were on the south end of the car?

A. We were right in the middle of the hand car; right between the machine that works it.

Q. Then were you facing north, east, south or west?

A. We were facing north.

Q. Did you have hold of the handles to work this crank?

A. Of course; we could not have been running if we did not have hold.

Q. Did you and Mares have hold of the same handle or different ones?

A. I do not remember for certain whether both of us were in front.

Q. Then you do not remember for certain whether you and Mares had hold of the same handle or not?

A. The same one I had, I am not certain, but I know he was in front with me.

Q. Where was the section foreman?

A. He was behind.

Q. He was not working the handles then?

A. Yes, sir; he was. We were in front and he was behind, working the other handle.

Q. He had hold of the other handle?

A. Yes, sir; he had hold of it; I am not certain whether Mares was with him there.

Q. You are not certain whether Mares and the section foreman had hold of the one handle and you the other handle, or

58 whether you and Mares had hold of the one handle and the section foreman the other handle?

A. Yes, sir; we were working very fast and the foreman had hold of the one handle and was working.

Q. But you do not know whether it was you and Mares together or the section foreman and Mares together?

A. Positively, I do not remember whether we were in front together.

Q. At any rate there was one of you facing to the south and the other to the north?

A. None of us toward the south.

Q. If the section foreman had hold of the handle opposite the one you and Mares had, he would necessarily look south, would he not?

A. He could not.
Q. All three of you then were facing the same way?
A. Yes, sir; the same way.
Q. You are certain of that?
A. Yes, sir.
Q. That all three of you were looking north?
A. Yes, sir.
Q. That is to say if the section foreman had hold of the other handle, he got around here on the south of this business that connects the two handles?
A. Yes, sir.
Q. You say he told you to take hold of it that way?
A. Yes, sir.
Q. Did you hear him tell you?
A. Yes, sir; I heard him; he told me.
Q. In what language did he speak to you?
A. In Mexican, because he spoke a few words in Mexican.
Q. Give us the exact words he said.
59 A. He told me to take hold of the handle and let us go quick.
Q. Did he tell you to look north?
A. And to turn my face that way.
Q. Did he say "Turn your face that way"?
A. He says—when I took hold of the handle, I took hold of the handle with my face south, and then he told me to turn my face that way and go quick together.
Q. Why did you take hold of the handle with your face south?
A. Because in the middle of the car we had the tools and the lunch; therefore I stood that way facing southward so I could work more easy, but he commanded me to turn my face that way, and I turned around and shoved the things away with my feet and kept on.
Q. It was more convenient to take hold of it and look south than it was to turn around on the other side of the handle and look north?
A. It was about the same.
Q. These tools were in your way when you were looking north?
A. Yes, sir; where I tried to stand the first way it was not as easy, but afterwards when he told me to move the things it was different.
Q. Did he give Mares that day any instructions as to how he should stand and work?
A. I do not remember.
Q. These words were simply addressed to you, were they?
A. Yes, he told me to turn from that way the other way.
Q. He was talking to you, then, and not to Mares when he said that?
60 A. He merely told me to turn around and go on with the hand car.
Q. He was not talking to Mares?

A. He spoke to me in Spanish and he spoke to Mares in English.

Q. You do not know what he said to Mares?

A. I do not know, but I think he told him the same thing he did me.

Mr. CHILDERS: We object to what he thinks.

Mr. FIELD: I do not care about it.

The jury is instructed accordingly.

Q. Is it not a fact that you always had instructions to look out for trains?

Mr. FIELD: I object to the question as not proper cross-examination.

Mr. CHILDERS: We submit that it is. We say that the effort of the plaintiff is to show that he was injured by the negligence of the section foreman by being in obedience to the orders of the section foreman. We want to prove he had general instructions to be on the lookout for trains.

Mr. FIELD: In the first place, the only effect the testimony could possibly have would be to show contributory negligence, and there is no such a plea in this case.

Mr. CHILDERS: We do not have to plead it specially.

The COURT: My impression is that it can be shown under the general issue.

Mr. FIELD: I object, further, because it is not proper cross-examination.

The COURT: I will let the testimony go in.

Mr. FIELD: The plaintiff excepts.

Q. (Repeated.)

A. They may have told the foreman; not to us.

61 Q. Did the foreman himself never tell you while you were in the employ of the company, that it was your duty to keep a watch out for trains, when you were on the tracks?

Mr. FIELD: I still object. If the court will allow me the same latitude in the examination of the witnesses on behalf of the defendant company, I have no objection.

The court overruled the objection, and the plaintiff duly excepted.

A. No, sir; he never told us.

Q. Your foreman never told you that or anything like it?

A. No, sir; he never told us anything similar to that.

Q. You understood it was the duty of the section foreman alone to look out for trains and you had nothing to do with that?

A. I understand he watched the trains; he knew the hours the trains came in and went out.

Q. Didn't the trains pass at all hours; uncertain hours and regular hours?

Mr. FIELD: I want to protest again against the gentleman making out his case with my witness.

The COURT: I think this is not proper cross-examination.

Mr. CHILDERS: The defendant excepts.

Q. Was it not necessary in order to insure the safety of yourself and others with you on that hand car, when you were running on the track with it, to keep a constant watch for trains?

A. I took only care of what the foreman told me.

Q. Were you not instructed to look out for trains all the time when you were at work on the road?

62 A. When I was working on the track naturally I used to take care of myself.

Q. You were instructed that it was the business of the section foreman to look out for trains and get out of the way, and not the business of the trainmen to look out for the sectionmen?

Mr. FIELD: I object to that on the ground that the defendant is making out its case with my witness.

The COURT: I think this is not proper at this time.

Mr. CHILDERS: The defendant will save an exception.

Q. Didn't you know as a matter of fact that it was absolutely necessary for your safety to look out for trains at all times?

Mr. FIELD: I submit that the witness has answered that question.

Mr. CHILDERS: I do not think he has answered it.

The COURT: He may answer the question.

Mr. FIELD: The plaintiff excepts.

A. If I had been instructed about that I would have taken care of myself and this would not have happened.

Q. I am not asking you whether you were so instructed, I am asking you now whether you did not know it without any instructions.

Mr. FIELD: I want to make a specific objection to that question: that the defendant presumes that the witness had not the right as a matter of law to rely upon his superior officers to so regulate the operations of the trains of the company as to insure his safety, when he was engaged on the line of their road, in their operations.

The COURT: You may have an exception.

Mr. FIELD: The plaintiff excepts.

Q. I am asking you if you did not know as a matter of
63 fact without any specific instructions that it was necessary to look out for trains in order to insure your safety?

A. I was not instructed about that; I know nothing.

Q. You say you did not know it was necessary to look out for trains to insure your safety?

A. When I saw them coming, why, of course, I took care of myself.

Q. And you could not take care of yourself unless you did look out?

A. That morni-g I was commanded by the foreman to go on with the hand car.

Q. That is not a response to the question.

The COURT: The witness will answer the question as it is asked.

Mr. FIELD: I insist that the witness has answered this question not less than six times.

The COURT: I do not think so.

Mr. FIELD: I except to the assumption of the court that he has not.

The COURT: You may have the exception.

Q. Please answer the question.

A. I could not; how could I watch?

Q. Do you mean you could not watch?

A. When we were running I could not watch.

Q. Were not trains passing frequently—every hour in the day almost without you or anybody else knowing what time they would come along?

A. Yes, they went through; but I did not know the hours.

Q. Neither did the section foreman know?

A. He may have known; he had a watch.

Q. But do all the trains on that railroad run exactly on schedule time, and are they always exactly on time?

64 Mr. FIELD: That is objected to on the ground that it is matter of defense and not proper cross-examination.

The court sustains the objection and defendant excepted.

Q. Is it not true that trains passed frequently, and at unexpected times during the day?

Mr. FIELD: I object to that as not proper cross-examination of the witness, and as part of the defense.

Counsel argue the objection.

The COURT: I am inclined to think it is not proper cross-examination of the witness, as there was nothing brought out from this witness about it. This may come up as a matter of defense when you come to put your testimony in.

Mr. CHILDERS: The defendant excepts.

Q. That accident occurred about five hundred yards north of the place where the hand car was started after you got the barrel of water from where you got the barrel of water?

A. About five hundred yards.

Q. And how far north of the depot here at Albuquerque?

A. About 1,000 yards, more or less.

Q. That is over here on the edge of town, in the northern part of the town, is it not?

A. Yes, sir; right there.

Q. You can see the place from this window, can you not?

A. I think so.

Q. Look out the window.

A. (Looking.) A little more or less it is that direction—it is over there.

Q. About opposite this direction in a straight line (pointing east)?

65 A. Right a little from that house which I see there.

Q. The track is perfectly straight in there, is it not?

A. Very straight.

Q. And the ground is level?

A. Yes, sir.

Q. And you can see up and down the track a long distance—from the depot down to that place where you were run over?

A. Yes, sir.

Q. Was the train moving fast or slowly?

A. I did not hear it myself.

Q. You never knew anything about the approach of the train till the hand car was struck?

A. Yes, sir; till we were run over.

Q. Was the hand car making any noise?

A. Much.

Q. The hand car does not make very much noise, does it?

A. Yes, sir; it makes a great deal for the fellows who work it.

Q. Which makes the most noise, the hand car or the train?

Mr. FIELD: I suppose it would depend somewhat on the position of the listener.

A. I do not know which makes the most noise.

Q. This section boss worked with you, did he not?

A. Yes, sir.

Q. He did work on the track, just like you did?

A. No; he used to command us. Sometimes he used to work also.

Q. He gave you directions, and also worked himself, did he not?

A. Yes, sir; on some occasions he used to work.

Q. He helped you work the hand car when you were going to and from work, did he not?

66 A. Yes, sir.

Q. He did a great deal of work every day on the track himself, did he not?

A. He must have done some. His work was to command us. I did not see him do much.

Q. You and the foreman were engaged in working on the tracks and repairing the tracks, both of you, and Mares as well?

A. Sometimes the foreman used to work with us.

Q. He didn't sit around in the shade all day and look at you, did he?

A. No; he was right with us all the time.

Q. And took part in the work?

A. He also used to work.

Q. And that morning you were engaged in going to the place where you were to work?

A. Yes, sir; we were going to the work.

Q. And he was on the hand car helping you and Mares to work the car?

A. Yes, sir.

Q. Now, you say you were taken to the depot in a caboose, and from the depot to your father's house—or your brother's house—which was it?

A. To my mother's house.

Q. And that you stayed in that house, how long did you say, in consequence of that injury?

A. I am there yet.

Q. When did you get out of the house after you were hurt—how long was it from the 5th day of June, 1889, until you were able to go out of the house?

A. Until I went out walking?

Q. Yes, sir.

A. I think I went down to get shaved in about four months.

67 Q. Were you under the doctor's treatment all this time?

A. Until I got up from bed I was.

Q. How long was it before you were able to get up from bed?

A. About four months until I went up town with my crutches.

Q. Had you just gotten out of bed when you went up town on your crutches?

A. The same as I have my cane there; that is the kind of a bed the doctor made me, and my leg was straightened out like that with the machine that the doctor put me there, and my head was down like this (showing).

Q. Was your head higher than your feet?

A. It was lower than my feet.

Q. How long a time were you in bed?

A. Two months and twenty-seven days.

Q. Now, after that two months and twenty-seven days you were able to get up and move around in the house, were you not?

A. Yes, sir; I used to drag myself from one place there to another.

Q. And it was about four months before you went out of the house, when you went up town to get shaved?

A. I do not remember exactly, but I went up town to get shaved. I went with a cousin of mine.

Q. But to the best of your recollection you think it was about four months after you were hurt?

A. Yes, sir; about four months.

Q. And you say the doctor attended to you all the time you were in bed; two months and twenty-seven days?

A. He did not attend to me every day but used to visit me.

68 Q. But he had not discharged you; he had not turned you loose?

A. I did not discharge him. He discharged himself.

Q. You did not understand my question—Who was the physician who attended you—Do you know his name?

A. I do not know his name.

Q. Was his name Doctor Kaster?

A. I understand he is.

Q. Any other doctor ever visit you?

A. Doctor Wroth; Doctor Wroth went with him, and another little fellow; I do not know his name.

Q. You have not been able to do any work, you say, at all?

A. Hard work, as I used to do, I cannot do now.

Q. Can you not work with your hands?

A. Yes, sir; I can take hold of the reins of horses, one, and two also.

Q. You stated this morning that you were looking for work, to see if you could not get some work——

A. If I could find somebody who would give me work, I would work.

Q. You would not be looking for work, if you could not do it if you found it, would you?

A. I think that I could not find somebody to give me work that would know I could not do as much as I used to do. I would work if I could.

Q. But there is a good deal of work you could do, if you could get it, is there not?

A. If I could find somebody who would want me to drive a buggy all the time, I could do it.

Q. Can't you think of something else besides a buggy to drive, that you could do?

A. I cannot think what work I can do.

69 Q. You walked on crutches for how long after you left the house?

A. I think I had them for about three or four months. It was a long while.

Q. Then, after that you walked with a stick?

A. Until now I walk with that (cane).

Q. With this kind of a stick all the time?

A. No, sir; a friend of mine gave me that, and I took it because it was pretty.

Q. Still you walk with that one now all the time?

A. Yes, sir. I used to walk with an oak stick—a thick one, so I could lean on it.

Q. You say that you were nursed during this time by your brothers and sisters?

A. And the doctor who cured me.

Q. The doctor who attended you as the physician and your brothers and sisters took care of you?

A. Yes, sir.

Redirect examination:

Q. Now, the hand car in use on the railroad is flat on top, is it not?

A. Yes, sir. It goes like this (indicating).

Q. It is flat like this table, is it not?

A. Yes, sir.

Q. Now, down through the middle of the car runs an upright piece which connects with the machinery which moves the wheels?

A. Yes, sir; that is what makes it go.

Q. Then that machine is moved by a lever extending through both sides of this center piece?

A. Yes, sir. Upon each end of that lever there is a handle which goes like that (showing).

Q. Now, a man working that hand car and standing on the car itself, assuming this is the north end of the car, a man might
70 just as easily stand this way and face to the north as to stand that way and face to the south?

A. Yes, sir; just the same.

Q. And it is customary among men in working a hand car to face in the direction in which the car is going, is it not?

A. According to the orders of the foreman.

Q. Your mayordomo tells you how you shall face and when you shall begin to work the car, does he?

A. Yes, sir.

Q. Now, when the hand car is in motion, is it customary for each individual on that hand car to attempt to watch the track both ways to see that no trains are coming, or is it the business of the foreman to know about the trains and to look out for them when the hand car is in motion?

A. I understand it to be so.

Q. You understand what?

A. That the foreman must look out for the trains while we work the hand car.

Q. You were asked about the foreman's duty in connection with the work, and you stated that the foreman told you what to do; did you ever tell the foreman what to do?

A. No, sir.

Q. If you did not do what the foreman told you, what happened?

A. He would discharge me from my work.

Recross-examination:

Q. Did that ever happen to you——

Mr. FIELD: With the gentleman's permission, I wish to ask another question.

By Mr. FIELD:

Q. When a section hand failed to obey the orders of the section foreman, what was the result?

A. They discharged him.

71 Q. Who was discharged?

A. The one that fails to do what the foreman commands.

Q. And who discharges him?

A. The foreman.

Recross-examination continued by Mr. CHILDERS:

Q. Did you ever know that to be done?
A. Yes, sir.
Q. When, in what case? Who was discharged?
A. A cousin of mine.
Q. Were you present when he was discharged?
A. No, sir; I was not present.
Q. How do you know it?
A. Very well, because I entered to work when he was discharged, and he told me the foreman had discharged him because he failed to do what the foreman had told him to do.

Mr. CHILDERS: I think this is hearsay and incompetent. We move to strike it out.
Mr. FIELD: I will not resist the motion.
Jury instructed accordingly.

By Mr. FIELD:

Q. State whether or not you entered the employ of the Atchison, Topeka and Santa Fe Railroad Company with the understanding that you were subject to the orders of the section foreman.

Mr. WALDO: The form of that question is rather objectionable.

Q. State what understanding you had, if any, with reference to the power of the section foreman to employ and discharge section hands.
A. That he was the foreman of the company, so that the men would do what he commanded them.
Q. What understanding had you as to his powers over the men?
72 A. That he had the power to order them and also to discharge the ones that would not obey him.

ANTONIO ANAYA.

The plaintiff called as a witness ANTONIO ANAYA, who, being duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. What is your name?
A. Antonio Anaya.
Q. Where do you live?
A. Here in Albuquerque.
Q. In what part of Albuquerque?
A. In New Town.
Q. Be as particular as you can, and tell us right where your house is.
A. It is at the end of the highlands—at the edge of the highlands.
Q. Anywhere in the vicinity of the Atchison, Topeka and Santa Fe Company's tracks?

A. Now I live at the end of the highlands, but when this happened I lived very near.

Q. Where did you live on the 5th day of June, 1889?

A. I lived very near the line; I lived in precinct No. 13.

Q. Do you know Joaquin Martin?

A. Yes, sir.

Q. Did you see anything happen to him on that day?

A. Yes, sir.

Q. Tell the jury all about it.

A. Being at my house, I started for a little meadow that is there across the line, I and another gentleman, Marcos Torres, started after some horses, to bring them, when we saw pass by the
73 hand car of the workmen and three individuals were on the hand car, Joaquin Martin and Donaciano Mares and another gentleman who I did not know. I think he must have been the foreman——

Mr. CHILDERS: We object to what he thinks.

No ruling.

A. They were traveling north; we saw them pass by there, and almost immediately we saw a train coming, and then we started to catch the horses and then we stopped, because I told Marcos that I thought the train would overtake them and throw them from the line very quick. They must have run about three hundred and fifty yards when the train overtook them and threw them from the line. Then we stood up there and I was very badly scared and we came to the house with the horses, and we saw the train standing there, but we did not go there till afterwards. That is what I know.

Q. In what direction were the men on that hand car looking?

A. When they passed there they were looking north.

Q. All of them?

A. I do not remember if all of them were looking. I did not pay much attention. I was there on my business, to catch the horses.

Q. Describe this train now; in what direction were they going—in what direction was the train going?

A. It was traveling north right back of the hand car.

Q. Well, was the engine of the train on the north end of it or where was it?

A. It was on the south side. It was pushing backwards.

74 Q. How many cars were there in the train, and what kind of cars were they?

A. I am not certain. I think there were two or three flat cars, and right next to them were two or three box cars.

Q. And what came next?

A. The engine.

Q. What next?

A. The caboose, I think, though I am not quite certain.

Q. State whether or not there was anybody on the north end of that train?

A. I did not see anybody.

Q. State whether or not you heard any bell rung or any whistle sounded, or any other alarm given by that train, of its approach?

A. I did not hear it.

Q. If any such a thing had taken place, would you have heard it—how near to the train were you?

A. I was about fifty yards from the line, in front of my house.

Q. State whether or not, if the whistle had blow- *n*or the bell had rung, you would have heard it?

A. I believe so.

Q. State whether or not you made any effort to direct the attention of these people to let them know of the danger—you or anybody else.

A. We stood standing there.

Q. Did you call out or make any signs?

A. No; I only told the gentleman that was near me, "I think the train will overtake them very quick."

Q. At what rate of speed was that train going?

A. Very fast.

Q. Have you any idea how many miles an hour?

A. No.

75 Q. Can you compare the speed of the train with the speed of a horse, so as to give the jury an idea as to how rapidly the train was going over the ground?

A. The train was running very fast; I think he was running just like a horse when he was running hard.

Q. Did you see the plaintiff after the accident?

A. Yes, sir; afterwards, in the evening I saw him at his house.

Q. But I mean immediately after the accident and before he was removed from that place.

A. No; I did not see him then—it is true that I went there but they would not let us come near.

Q. After this accident did you see anybody who had been in charge of this train?

A. I saw some persons that were there on the train. They must have been the engineers, I think; I did not pay much attention.

Q. Did you recognize any of them?

A. No, sir.

Q. Were any of the witnesses called in this case any of the persons you saw there?

A. If they were, I do not remember. I did not pay much attention to them.

DOLORES ANAYA.

The plaintiff called as a witness DOLORES ANAYA, who, being duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. Where do you live—and what is your name?

A. Dolores Anaya; I live here in Albuquerque.

Q. Do you know Joaquin Martin?
A. Yes, sir.
Q. Did you see him on the 5th day of June, 1889?
A. Yes, sir.
Q. Where did you see him?
76 A. I saw him first at his house.
Q. Did you see him afterwards?
A. I saw him when he was passing by on the hand car.
Q. Where were you at that time?
A. I was at home.
Q. Did you see anything happen to him at that time?
A. No, sir.
Q. Did you see anything happen to the hand car?
A. I did not see it.
Q. Where did you live on that day?
A. Up above New Town, about three or four hundred yards from the line.
Q. When you saw him pass on the hand car in what direction was he going, and who was with him?
A. I did not notice how many were with him.
Q. In what direction was he going?
A. They were on the line; all along the line.
Q. But which direction were they going?
A. They were going north.
Q. Did you notice which way Joaquin's face was turned when he was going north that morning when he passed you?
A. Yes, sir; he was facing the north.
Q. Now, did you see anything else after that?
A. No, sir.

Mr. FIELD: I understand I got the name wrong and this is not the man I wanted, and he may stand aside.

MARCOS TORRES.

The plaintiff called as a witness MARCOS TORRES, who, being duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. What is your name?
77 A. Marcos Torres.
Q. Do you know Joaquin Martin?
A. Yes, sir.
Q. Did you see him on the fifth day of June, 1889?
A. Yes, sir.
Q. Well, tell the jury about it.
A. Yes, sir; I will tell it. All I saw was that Mr. Joaquin Martin on the 5th day of June, at about seven o'clock in the morning, was working on the hand car on the railway, and he passed there where we were. Very soon I saw a train coming right immediately behind the hand car, and very soon I saw the train strike the hand car and throw it from the track. That is all I know.

Q. Now, how much distance was there between the hand car and the train when you first saw the hand car and the train?

A. About fifty yards, where I saw the train right back of the hand car.

Q. Do you mean that there was not more than fifty yards between the hand car and the train, or that you were fifty yards away from the track?

A. From the hand car to the train it was about fifty yards, more or less, when I first saw it.

Q. How fast was the train going, if you know?

A. As fast as it could possibly go, I think.

Q. State whether or not any whistle was blown or any bell rung or any other alarm given by the train of its approach?

A. When the train passed in front of where I was, the bell did not ring nor the whistle blow.

Q. Did any bell ring or whistle blow while you stood there?

A. At the time that it passed when I was there, no bell rang or whistle blew.

78 Q. Did you see anybody in charge of that train?

A. No, sir.

Q. Were there any men on the train?

A. I did not see the people.

Q. Did you see anybody on the end of the train that was toward the north?

A. I did not see anybody.

Q. How was that train constituted? Describe it to the jury. How was it running and what was the relative position of the locomotive and cars and all that?

A. There were about two or one flat in front, and they were followed by two box cars and then the engine and then the caboose and then flats toward the south.

Q. Was there an engine there?

A. Yes, the engine was in front of the two box cars.

Q. What do you mean by "in front;" was it on the north side or on the south side of the train?

A. Yes, sir; I say that first it was the flat and then the box cars and then the engine.

Q. Which way was the engine headed; was it headed north or south?

A. The engine was heading south. It was backing.

Q. The train was running backwards?

A. Yes, sir; it had the coal car towards the north.

Q. You mean the tender?

A. Yes, sir.

Q. The cow-catcher was toward the south?

A. Yes, sir.

Q. Did you see the plaintiff after the accident?

A. When I went there they had already raised him up.

Q. Was he hurt; did you see whether he was hurt, or not?

A. Yes, sir.

Q. Did you know how much he was hurt?

79 A. I saw him hurt after I went to the depot.

Q. Now, was anybody else hurt there at that time?

A. I do not know, because there was a person there that did not allow us to reach the place where the accident occurred.

Q. How many men were on that hand car as it went north?

A. There were three.

Cross-examined by Mr. CHILDERS:

Q. Who were they?

A. The ones I knew were Joaquin Martin and Donaciano Mares. The other was a stranger I never knew.

Q. Did you know them—Joaquin Martin and Donaciano Mares, at that time?

A. Yes, sir; very well.

Q. How were they looking?

A. They were facing north.

Q. All of them?

A. Yes, sir; the three of them were facing north.

Q. You were out there with Antonio Anaya, were you not?

A. Yes, sir.

Q. You say the train threw this hand car from the track?

A. Yes, sir. The train raised it and threw it off from the track.

Q. Where did it throw Joaquin?

A. When I reached there they had already raised him up.

Q. From where; the ground or where?

A. I never saw him on the ground; when I got there he was already on the car.

Q. How far were you from the hand car when the train struck it?

A. More or less, about three hundred yards.

80 Q. You and Antonio Anaya were there together?

A. Yes, sir. He and I went to bring some horses to hitch them to a wagon.

Q. Was the place where he was struck, north or south of the place where the road crosses the track?

A. North.

Q. How far north of that point?

A. I told you it must be about three hundred yards, more or less.

Q. North of that point?

A. From where I was at the time the train passed and the place that it struck him.

Q. But how far north of the mountain road was the hand car at the time it was struck?

A. I told you it must have been about three hundred yards, more or less.

Q. You told me you were three hundred yards from the hand car.

A. But I was on the road that goes to the mountains.

Q. You were standing there on the road, the mountain road—the Carnuel road—I mean this upper road that comes in back here?

A. Yes, sir; that is the road. I was standing about five yards from the road.

Q. And how close to the railroad track?
A. About fifty yards, more or less.
Q. And the accident occurred three hundred yards north of this place?
A. Yes, sir.

Redirect examination:

Q. And while you stood there you heard no bell rung and no whistle sounded?
A. No, sir; I did not hear any.

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Dr. J. P. KASTER.

The plaintiff called as a witness Dr. J. P. KASTER, who, being duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. What is your name?
A. J. P. Kaster.
Q. What is your profession?
A. Physician and surgeon.
Q. How long have you been a physician and surgeon?
A. Eleven years.
Q. What experience have you had, especially as a surgeon, and a railroad surgeon?
A. For the last eight years I have been in charge of a railroad hospital; three years in Burlington, Iowa, and five years in Albuquerque, New Mexico.
Q. Do you know the plaintiff, Joaquin Martin?
A. Yes, sir.
Q. How long have you known him?
A. About three or four years.
Q. Did you ever attend him, professionally, Doctor?
A. Yes, sir.
Q. When and under what circumstances?
A. I think it was some time in June, in either 1889 or 1890; I do not now remember which.
Q. What was his condition when you attended him?
A. He had been injured by—from some cause, and was suffering at the time from fracture or crushing of the chest and fracture of the ribs and a comminuted fracture of the femur—of the thigh-bone.
Q. Did you attend him in any special capacity?
A. I was informed by the railroad officers that this man had been hurt and was asked by them to see him.
Q. By officers of what railroad company?
82 A. The Atchison, Topeka & Santa Fe Railroad Company.
Q. If this man was injured on the 5th day of June, 1889, it was probably in 1889 that you attended to him?
A. Yes, sir.

Q. Doctor, describe his injuries; the length of time he was confined to his bed, the extent of his suffering, and the probable duration of the injuries he received.

A. Mr. Martin was suffering from the injuries to the chest—sufficient injury being done to fracture one or two ribs; I do not remember now. The only other injury that he suffered from at that time was to the thigh-bone, or femur, which was fractured—which had sustained a comminuted fracture. A comminuted fracture means that the bones are broken in two and one end of it had sustained a second fracture or splintering of the bone. The gentleman was suffering a good deal of pain at the time, but after placing him in bed and reducing his fracture and applying hot adhesive straps to his chest he was very much easier, and from that time on he never suffered excruciating pain, although he suffered as much as any man would who had that amount of injury.

Q. What was the immediate effect of this injury upon his vital force, Doctor?

A. I do not understand that question.

Q. Well, was the injury such as endangered his life?

A. For the first week or ten days, I was undecided as to whether he would recover or not.

Q. Then do I understand you that the first eight or ten days you considered him to be in constant danger of death?

A. Yes, sir.

83 Q. What was the extent of this injury—as to its probable duration?

A. It would be impossible for him ever to recover the full length of that leg, so as to make it the same length as the other.

Q. In other words, would you describe the man as crippled for life?

A. Yes, sir. The chest will entirely recover—has entirely recovered by this time.

Q. What, in your opinion, is the effect of this injury upon the man's capacity to labor and earn a livelihood?

A. He might do labor that did not require walking. I do not see why it should make him any weaker than he was before. Any labor which required him to move around rapidly this injury would interfere with, but any labor which he need not walk around much to perform he ought to be just as strong to do as before.

Q. Do you think that he is equal to lifting heavy burdens and carrying heavy weights for any distance, as he was prior to the injury?

A. No, sir; he is not.

Q. Do you know anything about the duties of a section hand on the railway?

A. Yes, sir; something.

Q. What, in your opinion, is the effect of this injury upon his capacity to labor or work as section hand on a railroad? Do you think he could repair road-bed, and put ties in place, or spike rails, or do work of that sort, now?

A. There are certain parts of the work he could perform as well

as he ever did in his life, but when it comes to carrying ties along the track, or on the dump, as they call it, I do not think he could do it.

Q. Do you remember how long this man was confined to his bed, Doctor?

84 A. I think I visited him every day, or every other day, for either nine or eleven weeks; somewhere in that neighborhood.

Q. Describe his position in bed during the time you had him confined to the bed.

A. He was placed on a bed without springs with a hard mattress; the foot of the bed was raised about six inches, and adhesive straps were applied to the leg from the knee down and a rod tied to these straps and a weight attached.

Q. How long did he remain in this position?

A. Either eight, nine or ten weeks; I do not remember the exact time. It was not less than eight weeks and might have been eleven. I did not make any note of it.

Q. What, Doctor, in your opinion, was requisite and necessary in the way of nurses for this man during that period?

A. The first ten days or two weeks it was necessary for some one to be with him all night and all day, and it strikes me that after that one nurse was sufficient, because he was not suffering great pain, and he could not get away from his dressing.

Q. Did he have such attendance, Doctor, while you had charge of his case?

A. I always found some one there watching at the time, but how long they stayed there I could not say. I always found them there when I arrived.

Q. Are you acquainted with the value of the services of nurses for such attendance?

A. That would be governed entirely by the qualifications of the nurses.

Q. Suppose the nurses had no special qualifications, but were simply ordinary men, employed during the day, and other

85 men at night, can you state what would be a reasonable compensation for such a day nurse and what would be the reasonable compensation for such a night nurse?

A. From a dollar to a dollar and a half for ordinary men who had no special training for nursing is sufficient for the day nurse, and from two to two dollars and a half for the man who is expected to stay at night—stay up all night to nurse a patient.

Q. Judging from this man's condition during the time that you attended him, would you say it was or was not unreasonable for him to have had the attendance of one man during the day and one man during the night during the entire time that he was confined to his bed, with his leg tied in the manner in which you have described.

A. As I said, it would be necessary to have one man in the daytime and one man at night for the first two or three weeks.

Q. Would you say whether or not it was unreasonable to have

had one man during the day and one man during the night during the entire time he was confined to his bed?

A. Yes, sir; I would. I would not think it was necessary to have a man night and day during the time he was confined to his bed.

Q. For what length of time did you think it was necessary to have two?

A. Not to exceed three weeks.

Q. You think it would be reasonable to have one man for the balance of the time?

A. Yes, sir.

Q. Your services to this man were paid for by the company—by the railroad company, were they?

86 A. I was paid by the railroad company for attending him; I receive a monthly salary for attending all cases.

Q. You have no demand against him for services rendered?

A. No, sir.

Cross-examined by Mr. CHILDERS:

Q. You say that for the first—that after the first two or three weeks it would be necessary to have had one man to attend him?

A. Yes, sir.

Q. What would have been the reasonable wages for that one man, to take charge of the case night and day and do all that was necessary during the twenty-four hours?

A. Two dollars a day would have been sufficient.

Q. I believe you stated that you went to attend the case by request or instruction of the railroad company?

A. Yes, sir; I was informed by the officers that this man was hurt and was at the depot. I cannot swear that it was an officer, but it was some one who was in the employ of the company.

Q. As surgeon of the company you rendered your services?

A. Yes, sir.

Q. You considered the result of the treatment—what did you think as to that—as to being a fair result, or not?

A. Considering——

Mr. FIELD: We admit that it is all that could have been expected.

A. Considering the amount of injury the result is as good as we could expect.

Q. How long did you say you attended to him?

87 A. I could not say exactly.

Q. Approximately?

A. About nine or ten weeks; somewhere along there.

Q. At the time that you quit attending to him what was his condition as to being able to walk about and move around?

A. After attending to him for ten weeks, or the length of time that I did attend him, I removed the adhesive straps and weights from his leg and allowed him to go off from his bed for the first

time, having fastened a suspensory around his leg in order to brace it up, because it was not entirely solid as yet, and I allowed him to get up on the condition that he should not bear any weight on that leg at all and that he should have the sole of his shoe on the well leg raised in order to keep the injured leg from touching the ground at any time, and instructed him that I would like to see him occasionally, because it is not the rule with any physician to take the dressings off from a fracture and simply turn the man loose without ever seeing him again, but we always instruct them to come around so that we may see them occasionally.

Q. Did he come?

A. I never saw the man afterwards for several months. I do not remember the exact time.

Q. Well, on that occasion did he come to see you or did you see him accidentally?

A. I met him on the street.

Q. Was he walking without assistance or with assistance, when you saw him?

A. He had a strong, heavy cane in his hand.

Q. Were his shoes properly arranged?

A. I could not say as to that.

88 Q. You were asked about his doing work and as to his being crippled; now when you say he is crippled, you do not mean to say that he is so crippled that he could not do ordinary work?

A. No, sir; by being crippled, I mean his leg is shortened and there is no way in the world to lengthen it.

Q. With the exception of his leg being shortened, is he otherwise as strong as he was before?

A. As a rule it is considered that men are just as strong after receiving a fracture of that kind as they were before.

Q. Now, is there any way by which the effect of that shortening can be overcome, largely?

A. Only by raising the shoe, or something of that kind. Often men having a short leg by tilting the hip can relieve it to some extent. One leg may be shortened to a great extent, and a man walking with the hips tilted can relieve it to a great extent.

Q. You think that he could do ordinary work that did not require rapid locomotion?

A. Yes, sir.

Q. Had you ever attended to him before this accident?

A. No, sir.

Q. Do you think he could do farm labor?

A. Yes, sir; I think he could. I think he ought to.

Q. Would you expect him to have ever suffered pain in his breast or in his leg, as the result of that injury, after his discharge as a patient?

A. It is a rule that men suffering from the injuries which this man suffered or received, suffer pain more or less for the first six months, or a year, and possibly a year and a half.

Q. And after that?

89 A. After that you could hardly attribute any pain to that injury.

Q. If he suffered any such pain now, you would not attribute it to that injury?

A. Hardly, at this day.

Redirect examination:

Q. This man cannot sleep on the side that was injured—he testifies in this case that that is the fact; would you consider, as a surgeon, that there is any improbability in that statement?

A. No, sir; there is none. Patients often suffer from lying directly on a fracture of that kind, especially where they have had any rheumatic trouble or anything of that kind.

Q. Do you think this man could plow and hoe and rake land, and do the ordinary work upon a farm, to the same extent as a man who had two legs of the same length and had never suffered any injury as this man has suffered?

A. The ordinary farm-work I think this man ought to be able to perform; probably not so rapidly as a man who never received any injury, but there is nothing in his injury which ought to prevent him from following that occupation, and successfully.

Q. Is it your opinion as a surgeon that this man could sell his labor in the market as well as though he never received this injury, in farm-work or any other kind of work?

A. He could probably receive the same compensation that he received before the injury. I do not think a man would be as willing to give him employment now as he would have been prior to the accident, as we always expect in hiring manual labor to buy the best we can for the money.

90 Q. Do you desire to be understood, Doctor, that this man, by reason of his failure to report to you after he was discharged, in any manner augmented the injury or retarded his recovery in any way?

A. I could only say that when I measured this man's legs last that there was very little shortening—not to exceed an inch, and I was somewhat surprised at seeing the amount of shortening when I met him on the street. Whether or not he followed my instructions I could not say, because I never had seen him at all.

Q. State, Doctor, whether or not it is a fact that this man made a most remarkable recovery and that you consider the result of his treatment, from a scientific standpoint, now as altogether satisfactory to you as a surgeon?

Mr. WALDO: I think that is hardly the right way to ask that question.

Mr. FIELD: I think the question is all right.

Mr. WALDO: We object to the form of the question, because it puts it right in the mouth of the witness what he wants him to say.

The court overruled the objection and the defendant excepts.

A. I have already stated that we did not expect the man to re-

cover from the injuries he received, and considering the injuries he received and the good, useful leg that he has left, I am satisfied with the result.

Recross-examination:

Q. You say that from the time you discharged him it was several months before you saw him, and you were surprised to see his leg was so short when you did happen to meet him on the street on that occasion; now, from his condition, Doctor, at the time you ceased to attend to him, you would not have expected that shortness to the same extent—to that extent?

91 A. When I discharged this man, I told him that the shortening would increase some over what it was at that time, from the fact that he had a comminuted fracture and that the bone was not perfectly solid at the time he was discharged, and while we expected some amount of shortening, I was surprised that we got as much.

Q. Then the result which followed from his condition after his discharge, was not as satisfactory as it ought to have been?

A. It was not as satisfactory on account of the fact that we had perfect motion there—it was not, as I said in my former testimony, as satisfactory in regard to the shortening as we might have desired.

Q. And you cannot tell whether that amount of shortening could have been reduced because he did not come around and see you as you told him to do?

A. I could not answer that.

Q. You cannot tell about that?

A. No, sir.

Q. If he had come to see you regularly as you requested you could tell whether that could have been obviated then to some extent—that is the amount of shortening?

Mr. FIELD: I object to the question. It asks the witness to speculate. I will withdraw the objection.

A. Certainly I could.

By Mr. FIELD:

Q. But you do not know whether it could have been?

A. I did not see the man and hence I cannot answer that.

92 DONACIANO MARES.

The plaintiff called as a witness DONACIANO MARES, who, being duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. What is your name?

A. Donaciano Mares.

Q. What is your business?

A. I am a workman for the railroad company.

Q. For what railroad company?
A. The Atchison, Topeka and Santa Fe Railroad Company.
Q. How long have you been so employed?
A. For about ten years.
Q. Do you know Joaquin Martin?
A. Yes, sir.
Q. Was he ever employed by that company?
A. Yes, sir.
Q. When?
A. I do not remember if it was in 1888 or in 1889. I do not remember in which of these two years.
Q. For how long a time was he employed by the company, if you remember?
A. I do not remember if for three or four months. I do not remember.
Q. In what capacity was he employed?
A. At the section.
Q. Was he a section hand?
A. Yes, sir.
Q. How were you employed at that time?
A. Working at the section also.
Q. By whom were you employed?
A. By Charles Smith.
Q. Who was he, and what was his business?
A. He was the foreman that managed us.
93 Q. Where is he now?
A. He was killed at that same time.
Q. Were you present when he was killed?
A. Yes, sir.
Q. Who else was present?
A. Joaquin Martin.
Q. State the circumstances under which he was killed?
A. He was killed by the train.
Q. Was anybody else hurt at that same time?
A. Yes, sir.
Q. Who?
A. I and Joaquin Martin.
Q. Well, state what occurred that day from the time you went to work until the time of the accident.
A. I only remember that I was going to turn my face backwards and he told me not to turn it; that I had no business to do it, and that it was not my business to watch for trains, and that he would take care of that.
Q. When was it he said that, and where?
A. I do not remember at what place. I do not remember whether we were traveling or at the place where we put the water on.
Q. What did you do that day before you were hurt?
A. I was working the car.
Q. You commenced to work the car, did you not, at some time that morning?

A. Yes, sir; we took out the hand car and put it on the rails. Then we started on the road. That is all I remember at this time.

Q. Well, which way did you start with that hand car?

A. Towards the north.

Q. In what direction was your face turned?

94 A. Toward the north, from Albuquerque.

Q. Who else was on the hand car beside yourself and Joaquin?

A. No one else except Mr. Smith.

Q. In what direction were Joaquin and Smith looking?

A. The same direction, we were all three of us.

Q. Now, what happened?

A. Then the train overtook us from behind and went through the crowd.

Q. Why didn't you hear or see the train coming?

A. I did not hear anything, the train didn't make any motion.

Q. When was the first knowledge you had that the train was approaching?

A. I knew nothing till it struck the crowd.

Mr. CHILDERS: By crowd, I suppose you mean the car?

A. Yes, sir.

Q. How badly were you hurt?

A. On my side I was hurt.

Q. And the section foreman was killed?

A. I did not see it, but that is what they say. I could not see him because I had fainted.

Q. You have continued in the employ of the railroad company ever since?

A. Three months afterward I again entered to work for the company.

Q. You have never seen Mr. Smith around since, have you?

A. No, sir; I have not seen him.

Q. What rate of speed was the hand car going at the time it was struck by the train?

A. I cannot say how fast it was going. It was going as fast as we could make it go.

95 Q. Had you any knowledge or information from any source whatever as to the approach of the train prior to the time the train struck you?

A. No, sir; none whatever.

Cross-examined by Mr. WALDO:

Q. You say you was going as fast as you could drive the hand car?

A. Yes, sir.

Q. What was your object in pushing it at that speed at that time?

A. Because the foreman commanded us in certain ways.

Q. To go out rapidly?

A. Yes, sir.

Q. Where were you going on the hand car—you and the foreman and Mr. Martin?

A. To the north.

Q. Up to Bernalillo?

A. No, sir; to Alameda.

Q. What were you going to do up there?

A. I do not know what the foreman was going to do; he was the one that commanded us.

Q. What had you been doing before that?

A. We were raising the road.

Q. Working on the track?

A. Yes, sir.

Q. Had that been the general nature of your employment?

A. Yes, sir.

Q. That was your employment during the time that Mr. Martin was engaged?

A. Yes, sir.

Q. And from the time that he was engaged is that what he was doing also?

A. Yes, sir.

96 Q. Under the supervision of this foreman?

A. Yes, sir.

Q. You say that when you went out you put the hand car on the track. How many men does it take to lift the hand car on and off the track?

A. We used to put it on, two of us, because only two of us were there at that time.

Q. Could two of you handle it?

A. Yes, sir.

Q. Why was it that you wanted to turn your face in an opposite direction or different direction from what the foreman directed you to?

A. I wanted to turn my face so that I could see if there was any train behind us.

Q. Which way did Mr. Martin have his face?

A. North.

Q. Had you any idea of a train coming that morning?

A. I only was distrusted once.

Q. You were simply looking out for yourself, so as to be sure that you would not be run over?

A. Yes, sir.

Q. Were you in the habit of doing that while in the employ of the company?

A. Yes, sir.

Q. To look out for yourself to see that trains would not run over you?

A. Yes, sir.

Q. Is it considered necessary to do that?

A. I believe it would be.

Q. You were working in a dangerous place where trains might

come along when you were not expecting them, and you considered it necessary to look out for them?

A. Yes, sir.

97 Q. Do you know whether Joaquin Martin had any idea as to the position he was in, as to its being safe or otherwise?

A. I do not know.

Q. You had never talked with him about the danger of working there without looking out for trains?

A. I used to tell him it was necessary for us to take care of us.

Q. On account of the danger of the position?

A. Yes, sir.

Q. Do you know whether or not the foreman was using the handle of the car—whether he was helping propel it or not?

A. Yes, sir.

Q. He was pumping also, was he?

A. Yes, sir.

Q. All three of you were working the car?

A. Yes, sir.

Q. Do you know what direction he had his face—were you in front of him or behind him, going north?

A. We were in front and he was behind, with his face turned the same direction.

Q. Did you look back to see how his face was?

A. Yes, sir.

Q. Now explain to the jury, Mr. Mares, the nature of that track and of the country over which you ran with this car from the place where you started to the place where the hand car was struck and you were injured—particularly as to whether the track was a straight track and the country an open country, and whether you could see for a long distance or a short distance, as the case might be.

A. There was nothing to impede the sight in the country, except that the foreman told us to turn our faces that way.

98 Q. I understand that. What I want to get at is, how far you could see up and down, from north to south.

A. We could see three or four miles more or less.

Q. Either way?

A. Yes, sir.

Q. And had you looked you could have seen this train that distance?

A. Yes, sir.

Q. And the only reason you did not look you say is because the foreman told you to look the other way?

A. Yes, sir.

Q. Did you not look back at any time from the time you started?

A. I did look back once and I told them that a train was moving, but he said to go on; it is none of your business about trains.

Q. So you only looked back once?

A. Only once.

Q. And so far as you know this foreman did not look back either, but kept his face to the north?

—. ——.

Q. And you did not know anything about this train until it struck you?

A. No, sir; I knew nothing.

Q. You could not hear it?

A. I could not hear it on account of the noise of the hand car.

Q. What kind of a train was this that overtook you there on that day?

A. The working train.

Q. What do you mean by "work-train," what does that kind of a train do?

A. Sometimes we call it the gravel train.

Q. A train that hauls gravel for the track, to be put in place by sectionmen and workmen?

99 A. Yes, sir.

Q. Do you know where that train was going that morning?

A. Yes, sir; after he hurt us, I knew. I did not know it before, because I worked on the section and could not know.

Q. Do you know who was on that work-train?

A. I do not know, because I knew no one and at the time the train hurt me I did not know any one.

Redirect examination:

Q. State whether or not you relied upon the statement of the foreman that he would look out for trains and that that was not your business.

A. I took his reason because he was the only one that managed us.

Mr. FIELD: That is the case for the plaintiff.

Defendant's Case.

Mr. Waldo opens the case for the defendant.

GEORGE KAUFMAN.

The defendant called as a witness GEORGE KAUFMAN, who, being duly sworn, testified as follows:

Direct examination by Mr. WALDO:

Q. Please state your name.

A. George Kaufman.

Q. State your residence and occupation.

A. I have been working between here and Las Vegas.

Q. In what capacity; who are you working for, and what are you doing?

A. The Santa Fe Company; laying steel, for the company, for the past year.

100 Q. Where were you on or about the month of June, 1889?

A. I was working here on the work-train—on the Rio Grande division.

Q. Who were you working for?
A. I was working for Mr. Hutchison.
Q. What position has he?
A. He was roadmaster.
Q. What were you doing?
A. We were repairing the track.
Q. Did you know John Smith—or Charley—the section foreman?
A. Yes, sir.
Q. Do you know what became of him?
A. Yes, sir. He was killed up here.
Q. Do you, of your own personal knowledge, know anything about the circumstances of his death?
A. Yes, sir; I was there and saw him killed.
Q. How came you to be there?
A. I was foreman on the train at the time.
Q. On the work-train you have mentioned?
A. Yes, sir. I was foreman on the train.
Q. That was the train that ran over the hand car?
A. Yes, sir.
Q. Did you know Mr. Martin here?
A. No, sir; I do not know the gentleman.
Q. Do you know about what day that was—the accident?
A. The fifth of June, I believe.
Q. In what year?
A. In 1889.
Q. What part of the train were you on?
A. I was on the tool car.
Q. Please state just how that train was made up and how many cars it consisted of.
101 A. The train was made up to pull south—the same as if to go south—heading south and we were backing up.
Q. You were backing up north?
A. Yes, sir.
Q. The engine then was to the south?
A. Yes, sir.
Q. What came next to it?
A. Next to the engine—a flat car.
Q. State how many cars there were—give a description of the order in which they were arranged in the train.
A. There were five flats, if I remember right, and the caboose—our tool car behind the caboose.
Q. What do you mean by "tool car?"
A. It was a flat car we had used for a tool car. It had a tool box on it; we carried our tools on it.
Q. The tool car then was the last car on the train?
A. Yes, sir
Q. And next to that was the caboose?
A. Yes, sir.
Q. That is to say—if I understand you, the train was backing up this way, north?

A. Yes, sir.

Q. Then this tool car was the first car on the train?

A. Yes, sir.

Q. Well, did you see anything of John Smith and his companions or of the hand car on the track in front of you that day?

A. Yes, sir; I saw them.

Q. Now state to the jury just how far they were from you when you first saw them and what, if anything, was done on the train and how that accident happened?

102 A. I could not say exactly how far the car was from us.

Q. I mean when you first saw it.

A. When I first noticed it it must have been a quarter of a mile—the hand car—the men on the hand car had, of course, plenty of time to get out of the way when we first noticed them and I thought, of course, they would get out of the way.

Mr. FIELD: Never mind what you thought, but please state what was done.

A. We struck the hand car.

Q. Was any effort made on the part of anybody on that train in any manner to avoid that accident; what was done in that connection?

A. The hind man and myself were both trying to get the signal to the engineer, but it seems as though the engineer was busy at the time and did not get the signal and the train did not stop; not until after we struck the hand car.

Q. What distance were you from the hand car before you commenced to give any signals?

A. I could not say. I did not measure the distance. We were quite a ways off.

Q. At what speed were you running?

A. I should think between seventeen and eighteen miles an hour; somewhere along there.

Q. What do you mean by saying you attempted to get the signal to the engineer? What did you do?

A. We gave our signal for the engineer to stop (waving hand).

Q. Who was engineer on that train?

A. Henry Decher.

Q. Was there a conductor on board, a man in charge of the train?

A. Yes, sir.

103 Q. Who was he?

A. A man by the name of Castle.

Q. How long was it, if you can estimate the time, after you commenced to give these signals, before you struck that hand car?

A. It was not a great while, but the time exactly I could not say.

Q. Was it a minute or half a minute?

A. I could not say. I would not want to say because I did not time the train—of course, we were going seventeen or eighteen miles an hour.

Q. Did you see the hand car at the time it was struck?

A. The hand car, of course, went out of my sight—just about the time we struck it it got out of my sight.

Q. Did you remain on the train?

A. No, sir.

Q. What did you do?

A. I got off.

Q. When you saw it was going to strike the hand car you jumped off?

A. Yes, sir.

Q. And you say that these men did not, either of them, turn their faces in your direction from the time you first saw them, that you could see?

Mr. FIELD: I object. I do not think he did say so——

A. No; they did not turn and look back.

Q. What position have you been filling on the railroad—with the railroad company?

A. General track-repairer—repairing track.

Q. In what capacity?

A. Since last January I have been laying steel.

Q. What is your position? Are you sectionman, foreman or what?

A. I am foreman.

104 Q. You say you were foreman of these men on the work-train in 1889 when John Smith was killed and this plaintiff was hurt?

A. Yes, sir; foreman of the men on the train.

Q. You say you expected these men to get out of the way?

A. Yes, sir.

Q. Well, state why—what was your reason for expecting them to get out of the way?

Mr. FIELD: I object. I do not think it makes any difference. The witness has testified that he saw this hand car a quarter of a mile away, saw the men were not looking and that no effort was made to stop the train until too late. I think this establishes a state of facts, even if it were shown that these men had instructions to look out for the train, which would render the men in operation of that train criminally liable and guilty of manslaughter. As a matter of law they had no right to expect or rely upon these parties' intention to get out of the way.

The objection is argued and the court overruled the same, whereupon the plaintiff excepted.

A. In running on the road many times we run onto hand cars at a very short distance, and the hand-car men—the men on the hand car get down and toss the car off in a very short time, and for that reason we naturally thought they would drop down and pitch the hand car off.

Q. Who was it gave that signal to the engineer?

A. I was signalling at him myself and the man by the name of Watson.

Q. What position did Watson occupy on that train?
A. He was hind brakeman.
Q. What do you mean by hind brakeman? Was there more than one on the train?
105 A. Yes, sir; there were two brakemen; one works behind and the other ahead.
Q. Where was this hind brakeman on the train?
A. He was on the steps of the caboose, I believe, at the time.
Q. I understood you to say that was next to the tool car, which was in front, where you were?
A. Yes, sir.

The COURT: Let me understand one question here: I have gotten somewhat mixed in regard to this testimony. If I understood the witnesses, the caboose was south of the locomotive.
Mr. WALDO: No; it was north.
The COURT: I understood one of the witnesses to testify that there were three flat cars, a couple of box cars, the engine and that then came the caboose. I think that is the way the witness for the plaintiff gives it. Let this witness give a description of the train as it was made up and running.

Q. In what direction was that train moving that morning?
A. North.
Q. At which end of the train, as being the south end or the north end, was the engine?
A. The south end.
Q. Was the train pushing back or going forward?
A. Pushing.
Q. Backing, you mean?
A. Yes, sir; backing up.
Q. That being the case, what did the northernmost part of the train consist of—what kind of a car?
A. If I remember right the first car next to the engine was a flat car—were flat cars.
Q. Then, what was next?
106 A. The caboose, and next came another flat car used for a tool car.
Q. And that flat car was the northern end of the train?
A. Yes, sir; that was the north end.

Cross-examined by Mr. FIELD:

Q. What did you have to do with the movement of that train?
A. Why, I had orders to work in a certain place; I had the orders and the train was moving to where I wanted to work.
Q. Who moved it?
A. The engineer moved it and the conductor had the orders of moving the train.
Q. The train moved under the orders of the train-dispatcher, did it not?
A. The conductor and engineer.

Q. The conductor got his orders from the dispatcher, communicated them to the engineer and the engineer moved the train in accordance with those orders?

A. Yes, sir.

Q. While that train was in motion what authority had you over its movement?

A. I had the privilege of stopping the train, provided I got out and gave the signal to stop it.

Q. Was it part of your duty to stop the train?

A. I suppose it was my duty to stop the train if I saw danger, or speak to the man who would stop it.

Q. Was it not the duty of the conductor under the direction of the train-dispatcher of that road to direct the movements of that train and to say when it should stop, when it should start and where it should go, and had you any authority whatever to interfere with the movement of that train except in the case of danger of accident, and in the absence of the conductor to warn
107 the engineer that accident was imminent and it was his duty to stop?

A. Well, if we got orders to work between stations at a certain place and I wanted to stop the train before we got to that place, I had the privilege of speaking to the brakeman or conductor or getting out and giving the signal myself, I suppose, if I wanted to.

Q. I am not asking you what you suppose you had the right to do.

A. Well, I had the right to speak to them and have the train stopped.

Q. You had the right to speak to the conductor, or one of the brakemen present who was acting in the stead of the conductor at that moment, and have the train stopped?

A. Yes, sir; probably.

Q. What I want to know from you is, and I would like to have you answer the question, whether you had any control over the engineer who was operating that engine. Is it not true that if the engineer paid any attention to your signal it was merely as a matter of courtesy to you and not because he was bound to do it?

A. Why, I was not employed as a brakeman. The engineer and the fireman on the work-train would take a signal from the foreman.

Q. The engineer had a right to take the signal from the foreman, but was not bound to do it, was he?

A. Why, why should he be?

Q. You are the man who is testifying here.

A. How is that?

Q. I am asking you whether the engineer is bound to obey your signal. Were you superior in authority to the engineer in the movement of that train?

A. I was not employed by the company to brake on the train.

108 Q. Were you employed by the company to do anything in

connection with that train except to ride on it to such place as the company desired you to work?

A. No; I was not paid.

Q. Whose business was it to direct the movement of that train and to look out for obstructions on the track while the train was in motion?

A. Whose business was it to look out for the train?

Q. For obstructions on the track while the train was in motion.

A. That was the trainmen's business and mine too, provided I would happen to see anything on the track. I would not be dumb enough to stand and watch them run over it without giving any signal and trying to stop the train.

Q. Now, Mr. Kaufman, do you understand English? If you do, I want you to tell this jury whether or not it was any part of your business or employment by this company, this railroad company, to take a position while this train was in motion where you could see obstructions on the track, if any occurred, and notify anybody in connection with the train if any such obstructions appeared; not what you did when you saw an obstruction, but I want to know whether it was your business to be looking out for obstructions while that train was in motion?

A. No.

Q. Whose business was it to look out for obstructions and to see that the track was clear while the train was in motion?

A. The brakemen, conductor, engineer and fireman.

Q. Is it part of the business of the brakemen to watch the track for obstructions?

A. Yes, sir; it is their business, certainly.

109 Q. And the duty of the brakemen to occupy a position where they can see the track all the time and look out for obstructions on it, is it?

A. Yes, sir.

Q. And if he sees obstructions, what is his business; what is his duty then?

A. I suppose to stop the train.

Q. Do you know what the duty of the conductor of the train is?

A. The duty of the conductor?—he gets his orders and runs the train. He gets his orders to run the train wherever the orders go.

Q. And that is all he has got to do with it, is it?

A. He is supposed to look out for the running of the train. It is his business. He looks out for the running of the train.

Q. Where was Mr. Castle, the conductor, at the time this train struck the hand car?

A. He was going from the engine, if I remember right, to the caboose.

Q. Now, let us have a description of this caboose? Was it a regular way car or a box car fixed up as a caboose?

A. It was a regular caboose.

Q. Had a cupola in it?

A. Yes, sir.

Q. Was anybody in the cupola of this caboose, when this train was moving backward?

A. I believe not.

Q. Is it not the duty of the conductor or the hind brakeman of the train to be in the caboose and in the cupola when the train is moving backward, in order to communicate promptly with the engineer if there are obstructions on the track? Is it not his duty either to be in the cupola or on top of the caboose?

110 A. This brakeman, if he could see the track—look out for the track, and thought he could get a signal to the engineer as well there as he could on top of the caboose, that was his place.

Q. Is it not the duty of the hind brakeman or the conductor of the train, whenever a train is in motion backwards—I mean of a freight train—to occupy a position which will enable him instantly to communicate with the engineer in the engine?

A. That is his duty; yes, sir.

Q. If there had been any such person in such a position this accident would not have happened, would it?

A. It likely would. They might have got out of it, but it was naturally thought they would get right out of the way, as I stated a while ago.

Q. How long would it have taken to stop that train? What length of ground would it have taken to stop that train by the engineer, the train running at the rate of speed you say it ran?

A. What distance would it take to stop that train? It would depend on what kind of brake the man had; how his air was working. Sometimes the brakes take hold very quickly after applying the air, and again the brakes don't all work exactly alike.

Q. Now, let us assume that the brakes were in the best possible condition, good repair and good working order, and worked just right; how long would it take? What distance would it take to stop the train?

A. If the air was working in good shape—well, I would not say how far you would go exactly. I have seen them stop quick enough to jump off the track and jerk the drawheads out of the cars with the air, and at other times do their best and go quite a ways.

111 Q. It is your opinion now, as I understand you, that if every man upon that train connected with its operation had been in his place, doing exactly the best he knew how and the best that a skillful railroad man could have done—that notwithstanding that, this accident would have happened just as it did happen?

A. Why in running a train persons will often walk across the track but we don't stop every time a person walks across the track and stands and looks at the train. I do not think we would have stopped. I think we might have got the signal if the brakes worked well and stopped and saved the accident.

Q. According to your idea of the way to run a railroad, however, it would have been proper for the people running that train to

have just gone on and run over and through these people without ever trying to stop?

A. No; that is not my idea at all. As I stated a while ago, we often run a very short distance of the hand car and it will get out of the way, and as I said before, if the brakes had been working and when we saw they were not going to get out of the way we might have stopped and saved them.

Q. Now this caboose relatively to the flat car was about as these books are, was it not (demonstrating)? This flat car was at the end of the train, with reference to the caboose, and was about like these two books are, was it not? The caboose was very much higher than the flat car?

A. Yes, sir.

Q. You were endeavoring to give a signal to the engineer, around the side of the caboose, out on the side of the flat car, were you not?

A. Yes, sir.

112 Q. The engineer could not see you from where you stood on the flat car unless you put yourself as far out as possible?

A. The engineer could see the signal on the side of the train.

Q. You think he can see the signal from the side of the train as well as he could from the top of the caboose?

A. He could see the signal, yes, sir; he could see the signal.

Q. It is not the business of an engineer to look for a signal at any particular place, when he is running backward, is it, as you understand railroading?

A. He is expected to look at the rear end or head end, which way it may be, for the signal.

Q. He is supposed to be looking for signals all the time when he is running backward at the rate of sixteen or eighteen miles an hour; he or his fireman?

A. Well, he is supposed to be; yes, sir.

Q. What became of the conductor and engineer who were running this train?

A. The conductor—I do not know what became of him. The engineer, I am told, works in Argentine, Kansas.

Q. Do you know whether or not the conductor was discharged by the company on account of this accident?

A. No; I do not know.

Q. You never heard anything about that at all, did you?

A. No, sir.

Q. How long had he been running that train?

A. The work-train—I do not remember.

Q. How long did he continue to run it after the accident?

A. I do not remember that exactly, whether it was a few days or several days.

113 Q. About how many days?

A. I said I do not remember exactly how many. I would not say it was five or twenty. I do not remember how many days.

Q. You do not know whether it was five days or five hours?

A. It was not five hours; no. As I said, it was several days after-

ward; he was there several days afterward and it might have been five, eight or ten days.

Q. Then another conductor took charge of the train?

A. I do not remember whether the crew was taken off or not.

Q. Now, when you first saw that these men were not looking you did see that these men did not know the train was coming, did you not?

A. How is that question?

Q. You discovered that the men on the hand car were ignorant of the fact that the train was coming?

A. Yes, sir; we surely did. We saw that they did not see the train when we were within a car-length of them—they had not noticed us—whether they had looked back or knew we were coming before we got so close, that I could not say because I do not know.

Q. How far away from them were you when you first decided in your own mind that they did not know you were coming and were not going to get off the track? How far away from them were you when you made up your mind that it was necessary to give this signal, which you say you gave?

A. The signal was given when we saw that they were not going to get out of the way. As I said before, we often run up very close to a hand car and they get out of the way—they jump down
114 and push it off in a very short time. The foreman, as I said, often would let a train run up within a short distance.

Q. Now, will you kindly answer my question?

A. I would not say just how close we were to the hand car when I did not measure the distance.

Q. Well, you never can testify anything about distance unless you take a tapeline and measure it can you? You have no judgment of distance unless you measure it?

A. I am not guessing at this. I would not say exactly.

Q. I would like to have your best knowledge and opinion as to the distance. How far were you when you first gave the signal—when you first made up your mind to give the signal that the hand car could not get out of the way?

A. I guess about three telegraph poles.

Q. What is the distance between the telegraph poles?

A. About two and a half—or three telegraph poles—and the distance between the telegraph poles out here is—I believe is—that I do not know. It is something like one hundred and twenty or maybe one hundred feet.

Q. Then you think you were somewhere in the neighborhood of three hundred or three hundred and fifty feet from the hand car when you concluded it was necessary to give a signal to the engineer that these men were not going to get out of the way?

A. Well, the signal was given long before this; long before this—long before—to slow up, provided that would let them out of the way. The signal was given before we got in this distance of the hand car.

Q. Had the speed of the train been slackened?

A. No, sir.

115 Q. How far were you from the hand car when you first gave the signal, you think?

A. That I would not say.

Q. What is your best judgment? We do not expect you to tell within a foot or fifty feet.

A. My best judgment would be about six or eight telegraph poles.

Q. Now, if that signal had been seen by the engineer there was ample time to stop the train and avoid the accident, was there not?

A. If the brakes had worked well we might have stopped and saved the accident.

Q. Did you see the conductor at the time this accident happened; at the moment when the train struck the hand car?

A. No; I do not remember that I was looking at the conductor right at this time.

Q. Where was the conductor the last time you saw him before the accident?

A. The conductor? The last time I saw the conductor was just as we were leaving the town. I got onto the rear end and he got on the engine.

Q. When you say then that he was coming from the engine to the caboose, that is stating what somebody told you and is not of any knowledge of your own?

A. When he was going from the engine to the caboose?

Q. You so stated a while ago——

A. You asked me where the conductor was at this time, and I told you that I thought the conductor was coming from the engine to the caboose. That is what I thought about it.

Q. But you have no knowledge of your own about it?

116 A. I did not see him. I was not watching the conductor.

Q. You did not see the conductor from the time the train left Albuquerque until the accident happened?

A. I might have noticed him as the train passed along—I might have seen him—might have looked around.

Q. I am not asking you what might have happened. I am asking you what you recollect.

A. I do not remember seeing him. I might have seen him, as I said. I might have looked around.

Q. You have no recollection of having seen him?

A. No, sir.

Q. Did you see Watson?

A. Yes, sir.

Q. Where was Watson?

Adjourned until 2 p. m.

Q. You say you saw Watson about the time of the accident?

A. Yes, sir; I left the train just before they struck the car.

Q. What was Watson doing at the time you last saw him?

A. Trying to stop the train.

Q. Trying to signal the engineer from the steps of the caboose, as I understand you.

A. Yes, sir.

Q. Did Watson jump?

A. I do not know whether he jumped or not. He told me he jumped.

Q. You did not see him jump?

A. He got off on the opposite side from me.

Q. Where is Watson now, if you know?

117 A. I told you this morning I did not know where he was.

Q. I think you are mistaken. I do not think I asked you where Watson was this morning; I asked you about the conductor and the engineer.

Q. What kind of a day was this?

A. If I remember right it was a pleasant day.

Q. Was it a windy day?

A. Not windy enough to blow dust to prevent any one from seeing anything; there might have been a breeze blowing, a slight wind.

Q. Was there wind enough in any way to interfere with the communication between the rear end of the train and the engineer?

A. I do not think there was.

Q. What was the condition of the track at that place, as to being ballasted or not?

A. There is no ballast there.

Q. Is there no rock ballast?

A. No, sir.

Q. It was very dry at that time, was it not?

A. I believe there was water on one side of the track. I remember very well—I got off in it. This was on one side; on the other side there wasn't anything.

Q. But the road-bed proper was dry and dusty, was it not?

A. I would not say the road was dusty, or I would not say it was wet. It was not muddy; it was in middling condition.

Q. A freight train running from sixteen to eighteen miles an hour at that season of the year would certainly make a great deal of dust, would it not, Mr. Kaufman?

A. Why, not dust enough—it might raise a dust, but not

118 enough to prevent any one from taking a signal or to prevent the men on the hand car from seeing what was coming.

Q. You are certain there was not enough dust raised by that train in its motion to interfere with the communication between the two ends of the train?

A. These flat cars, being empty, might have been raising a dust to prevent the engineer from seeing the signal, but I do not think so.

Q. If there was any dust that interfered with the engineer seeing the signal, you do not know it?

A. How was that?

Q. If there was any dust which in any manner interfered with the engineer seeing your signal, you do not know it?

A. No; I do not know; might have been.

Q. Where was this train going that morning, Mr. Kaufman?

A. They were going up to work between here and Bernalillo.

Q. In what particular place, if any?

A. Why, we had orders to pick up bridge material that was scattered along and to haul some dirt.

Q. From whom did you have those orders?

A. From Mr. Hutchison, the roadmaster.

Q. The roadmaster of the road was your immediate superior officer, was he?

A. Yes, sir.

Q. You stated that you were foreman, but I believe you did not say of what—were you foreman of bridge-repairers?

A. I was foreman of general track-repairers, on any kind of extra work that would come up.

Q. On the Rio Grande division?

A. Yes, sir.

119 Q. What, if any, authority or control had you over the section hands?

A. Why, the extra foreman, if we were working together—the foreman of track generally—we try to work together and get along together. As far as my having any orders and giving the foreman orders what he shall do—so far as my giving the foreman orders what he shall do, that is not my place.

Q. Neither is it your place to give orders directly to the section hands, is it?

A. Yes, sir; when we are working together, they generally work under me.

Q. Under what—I did not understand you?

A. When we are working together, the sectionmen and the extra men work together under the extra foreman. We generally work together where we are working at the same class of work.

Q. You employed and discharged the men who were under your immediate supervision, did you not?

A. The men I hire, yes, sir.

Q. The section foreman employed and discharged the men under his immediate supervision?

A. Yes, sir; when we are working together, and his men, the section foreman's men, and mine are working together, I have the privilege of discharging the men.

Q. Did you ever discharge a section hand, Mr. Kaufman?

A. I believe I have.

Q. When?

A. I remember I discharged a man at Elota, this side of Wallace, some time ago.

Q. Who was the sectionman?

A. He was working for the foreman before I came down there at this time.

120 Q. And he was a sectionman when you discharged him?

A. Why, we were all workmen together. Of course, he had been working on the section and I was working on the section. We were both working at the same kind of work. All are sectionmen so far as that is concerned, and you may call them all sectionmen while working on that same section.

Q. That is what you call them, is it? They are all sectionmen—the men who work under you?

A. Yes, sir; they often speak of them being trainmen—working on the train, but picked-up sectionmen are workingmen on the train.

Q. Is it not true that sectionmen work on sections of the track—generally about eight or ten miles long, and the extra gang of track-repairers, of which you were foreman, work on the entire division?

A. Work over the division—yes, sir; start right along and pick up sectionmen and take them over the division with me and all work together.

Q. And when you take sectionmen to work in conjunction with you and your gang, you do that under the direction of the roadmaster, do you not?

A. Yes, sir.

Q. You have no power over the sectionmen except under the direction of the roadmaster, to call them to your assistance—on special occasions, for instance?

A. Yes, sir; on special occasions, I am supposed to use my judgment about anything of that kind—if any accident or anything happened and I needed the men and the men are there, to call on them and use them.

Q. You had no instructions on this 5th day of June to take up these men—these sectionmen on this section, had you?

121 A. Not this day. This day they were not to help. I do not believe they were to work on the train the same day that car was struck. The day before I believe the foreman was helping me here in town.

Q. But on this particular day you had no instructions to have anything to do with these sectionmen?

A. Not that I remember of.

Q. The fact is that you were going beyond the limits of this section to work?

A. Part of my work was to be done up about three miles.

Q. How far?

A. Three miles or three and a half, if I remember—out around the other side of the Indian school a piece, I believe.

Q. What were you to do there?

A. Load some dirt, I believe, at that point.

Q. Where were you going to take the dirt after you loaded it?

A. Filling up around the yard; some of it down here to the mill and afterwards some right along where we struck this car—along around that place.

Q. On the same day?

A. We hauled some on the same day—in the afternoon.

Q. Were your instructions in writing that day, Mr. Kaufman—your orders?

A. Yes, sir.

Q. Where are those orders, do you know?

A. I do not remember; I received an order telling me to work in this place.

Q. Did you make any report of this accident to anybody?

A. Yes, sir.

Q. Was your report in writing?

A. Yes, sir.

122 Q. To whom did you make that report?

A. To the roadmaster.

HENRY DECKER.

The defendant called as a witness HENRY DECKER, who, being duly sworn, testified as follows:

Direct examination by Mr. WALDO:

Q. What is your name and your present residence?

A. My name is Henry Decker; my residence Argentine, Kansas.

Q. If you remember, state where you were and what you were doing in the month of June, 1889.

A. I was running a work-train at that time between Wallace and the Isleta bridge.

Q. How long had you been running the work-train between those two points?

A. Why, I was on about—well, between three and four weeks.

Q. Prior to the first of June did you begin, or afterwards?

A. Yes, sir.

Q. Prior to the first of June?

A. Yes, sir.

Q. Do you know anything about—did you know John Smith, or Charley Smith, who used to be section foreman along the track here?

A. I never knew him; I was not acquainted with him.

Q. Did you ever see him?

A. Yes, sir; I have seen him once or twice.

Q. He is dead, is he not?

A. A man by that name was killed on the hand car.

Q. When was that? About what date?

A. I think it was on the 5th of June, 1889.

123 Q. Do you know anything about the circumstances of his killing?

A. Well, I did not see him get killed, but I know about how it was done.

Mr. FIELD: Please tell just what you know and not what anybody told you.

A. Well, I did not say anybody told me; I am just saying I know about how it was done.

Q. Were you the engineer of the work-train that ran over the hand car on which he was?

A. Yes, sir.

Q. State to the jury just how, if you know, it came about that that train ran over the hand car.

A. Do you want me to give an explanation as to how it all happened?

Q. So far as you know.

A. Well, on leaving Albuquerque this morning—June the fifth—we were going out to pick up some bridge timber and do some ditching and we started out with the train ahead of the engine—that is, we were pushing the train with the engine. The engine backed up, and after we got out about a mile from town I noticed the foreman—the foreman of the men that were working on the train—I noticed him jump——

Q. Do you mean Mr. Kaufman?

A. Yes, sir. Thinking he fell off, I stopped the train as quick as I could, and it was either Mr. Kaufman or the brakeman came up and told me——

Mr. FIELD: I do not want you to give that.

Mr. WALDO: We will not insist on it.

Q. What did you do?

A. What is it you want to know?

Q. What was done; what did you see after you stopped the train?

A. I seen that we ran over the hand car.

124 Q. Was anybody on the hand car, or was there any evidence of anybody having been on it?

A. I do not know whether there was or not.

Q. Was there anybody hurt about there that you saw?

A. There were two or three men on the car that were hurt, I guess. I think they were on the car.

Q. Well, was John Smith about there?

A. Yes, sir.

Q. Was he living or dead at that time?

A. I did not go to him.

Q. You do not know?

A. I do not know.

Q. Well, state, Mr. Decker, what were your duties as engineer as to looking out over the track in driving or pushing—in pulling or pushing a train.

Mr. FIELD: Were your instructions in that regard in writing—printed rules?

A. Yes, sir.

Mr. FIELD: Then I object to the question.

Q. How came it then, Mr. Decker, that you happened to run over these men on that day, if you know—why was not the train checked before you reached them?

A. Why, just before I saw Kaufman jump off the train I was turning on the lazy cock to put the injector to work, to put water

in the boiler. Of course that took quite a little time—sometimes it takes thirty seconds and sometimes two minutes.

Q. About what speed was your train running?

A. About fifteen and eighteen miles an hour—not to exceed eighteen miles an hour.

Q. Am I to understand that your attention was not directed to the track because you were turning on this water as you say, to fill the boiler?

125 A. Yes, sir.

Q. And you cannot state about the length of time you were occupied in doing that?

A. Why, from about thirty seconds to two minutes, I could not give the exact time.

Q. There is a difference between thirty seconds and two minutes. How far would the train have run, at the rate it was going, in thirty seconds—how many yards or feet?

A. About five or six hundred yards, or seven or eight, maybe.

Q. You did not see any signals, then, given to you?

A. No, sir.

Q. The first you knew of anything being out of the way was when you saw Mr. Kaufman jump from the train?

A. Yes, sir.

Q. That is all.

Cross-examined by Mr. FIELD:

Q. Did you have a fireman in the cab with you?

A. Yes, sir.

Q. What was he doing?

A. At that time he was putting coal in the fire.

Q. Is it ordinary care on the part of an engineer and fireman of a locomotive engine, in your opinion, to back a train at the rate of from fifteen to eighteen miles an hour at the place where you were backing this train, without either the engineer or the fireman watching the rear end of the train for signals?

A. Yes, sir; if my duties require me to be working in the cab. I cannot look both ways, and the fireman must put in the fire, regardless of everything else; because if we do not do that we might as well stop.

Q. And if, while you were engaged in doing something
126 else in the cab and the fireman was putting in the fire, you ran over a man and killed him, you think that is just his misfortune, do you?

A. No; I do not think anything of the kind.

Q. Now, don't you know, as a matter of fact, Mr. Decker, that either you or your fireman—in the first place don't you know that it was not due care to back a train at that rate of speed at that place?

A. Yes, sir; I think we used good judgment.

Q. If you used good judgment why was it you ran over this man and killed him?

A. Well, I will explain to you just about how the thing might happen every day. Suppose we were running along the road and we overtook a hand car or any persons on the track—walking on the track—why we run up to them until we think there is danger, and then if we think there is danger we will try to draw their attention with the whistle, and if they do not pay any attention to that we will stop as quick as we can.

Q. Now, before you go any further. When you are backing a train and you are occupied in the cab and the fireman is putting in the fire, while your train runs six, or seven or eight hundred yards, you simply take your chances about obstructions arising for that distance?

A. We have got it to do.

Q. How much distance would it take you to stop that train, made up as it was on that day, and running as it was at the time of this accident?

A. Why, that would be a hard matter—to state to you exactly the distance.

Q. I am not asking you to state exactly. What is your best judgment?

A. About four hundred feet.

Q. Now, you say that you were certainly occupied in put-
127 ting the water in the boiler while the train was running six, or seven or eight hundred yards, and you may have been as much as two minutes at it?

A. No; I do not think I was quite two minutes.

Q. Do you remember how long it was on that occasion, Mr. Decker?

A. No; I do not remember exactly, but about a minute or a little over, probably.

Q. Well, in a minute, if you were running eighteen miles an hour, you would run more than a quarter of a mile?

A. Yes, sir.

Q. You crossed a public highway less than a quarter of a mile to the south of the point where you struck this hand car, did you not?

A. Yes, sir.

Q. Did you sound any whistle or ring any bell at that highway?

A. Didn't ring any bell but we sounded the whistle.

Q. You are positive of that, are you?

A. Yes, sir.

Q. Were you engaged in putting water in the boiler at the time you crossed that highway?

A. I do not know whether I was or not.

Q. From whom did you get your order for the movement of that train?

A. I get my running orders from the conductor.

Q. But the conductor communicated to you running orders from some other officer of the company?

A. The conductor gets all of his orders from the dispatcher and he delivers the orders to me.

Q. And you move the train in accordance with the orders of the dispatcher communicated to you through the conductor?

A. Yes, sir.

128 Q. What, if any, control has any other person over the movement of that train?

A. Outside of the engineer and the conductor?

Q. Yes, sir.

A. Not any.

Q. Did you make any report in writing about this accident, Mr. Decker?

A. I did.

Q. To whom?

A. I made a report to the master mechanic at San Marcial.

Q. Did you get a lay-off from the company on account of this accident, Mr. Decker?

A. No, sir.

Q. Did the conductor?

Mr. CHILDERS? Of your own knowledge?

A. I do not know whether he did or did not. I worked for about three weeks afterward and we were working together, and then I left.

Q. Then you left. Did you leave because you thought you would get a lay-off?

A. No, sir. I am still working for the same system.

Q. How long does it take one of those small favors to get around after a report of an accident of this character, as a rule?

A. Why, it would be very shortly if they wanted to lay you off.

Q. You went some other place to work, did you, for this company?

A. I will state here how I happened to come down in this part of the country. Business was slack at Topeka, where I was running,

129 and they asked me if I would not come to San Marcial and help them out during the rush, so I stayed down here until the rush was over and then returned.

Q. The conductor was still working for the company—Conductor Castle was still working for the company at the time you left?

A. I think he was running the same train at the time I left; yes, sir.

Q. Did you continue to run it?

A. Why, I continued to run it until about the 25th or 26th of that month.

Q. If you or the conductor, or anybody connected with that train, were guilty of any neglect of duty at the time this accident happened, you do not know anything about it, do you, Mr. Decker?

A. No; I do not.

Q. So far as you know, at the time of this accident, every man connected with that train was exactly where he ought to be and doing exactly what he ought to be doing?

A. Yes, sir.

J. G. HUTCHISON.

The defendant called as a witness J. G. HUTCHISON, who, being duly sworn, testified as follows:

Direct examination by M-. WALDO:

Q. State your name, and what is your occupation and residence.

A. J. G. Hutchison; roadmaster on the Santa Fe railroad; reside in Albuquerque.

Q. What was your occupation about the month of June, 1889?

A. Roadmaster.

Q. Where did you live at that time?

A. Here in Albuquerque.

130 Q. You were roadmaster of what?

A. The Santa Fe—in charge of track department.

Q. Of the Atchison, Topeka and Santa Fe Railroad Company, do you mean?

A. Yes, sir.

Q. Is the track department under your immediate charge?

A. Yes, sir.

Q. What are your duties as roadmaster? How do you carry into effect your plans as to keeping the track in repair, &c.?

A. I employ the section foremen and place them on the sections, composed of eight or ten miles to each man, and I lay out the work for him and tell him what he has to do, and he employs the men to see that they do the work properly.

Q. How about the powers of the section foreman, since we are in this connection, as to discharging men?

A. The foreman employs the men, and whenever they do not work as they should, or do anything that he thinks they should be discharged for, he either comes to me in person or gives the laborer a note to me, requesting their discharge check.

Q. Was that the rule and custom in June, 1889?

A. Yes, sir.

Q. How are these sectionmen paid—who pays them?

A. The Santa Fe Railroad Company. They get their pay from the agents; at that time from the pay car.

Q. How is it determined? How does he arrive at the information necessary to pay them?

A. He sends their time at the end of the month to me, and

131 I check them off; that time goes to the superintendent's office and he makes out the pay-roll and sends it to Topeka.

Q. And at that time they were paid by the pay car?

A. Yes, sir.

Q. What other employé possessed the appointment of sectionmen and assigning them to sections and prescribed their duties?

A. We have work-trains with foremen on them to haul material that the sectionmen cannot get hold of, to repair the roadbed.

Q. And they are under your direction?

A. Yes, sir.

Q. State whether or not about the 5th of June, 1889, or during that month, there was a work-train employed anywhere on this route?

A. There was; between Socorro and Wallace. At that time they were working here at Albuquerque.

Q. Do you know who was in charge of that train? Who were the persons who were on it?

A. Yes, sir; the foreman of the men was George Kaufman, conductor by the name of Castle and Engineer Decker.

Q. I desire to ask you how far your route ran? What were its limits?

A. At that time, the fifth of June, 1889, from Socorro to Wallace.

Q. You do not know anything about this accident, personally?

A. No, sir.

Q. Do you know where that train was working on that day?

A. Yes, sir.

Q. Of your own knowledge, I mean?

A. Well, not directly; I had written an order for them——

132 Mr. FIELD: If that order is in writing, I think we would better have it.

Q. Have you the order with you?

A. No, sir.

Cross-examined by Mr. FIELD:

Q. You say that you had trainmen operating the work-train under your direction?

A. I had.

Q. What authority had you over the engineer, the conductor and the brakemen on that work-train?

A. I guess—I laid out their work for them where they were together.

Q. Do you mean to say that you directed the movement of that train?

A. Not directly. Just simply told them where to go to work.

Q. From whom did they get their orders to move that train?

A. The trainmaster.

Q. And you selected the places where the work was to be done, and you communicated to your track foreman that you wanted him to take certain men and certain materials and go to a certain place to do work?

A. Yes, sir.

Q. And you communicated to the operating department that you desired a train for the purpose of moving these men and this material to this point?

A. Yes, sir.

Q. And the operating department moved the train at your request?

A. Yes, sir.

H. U. MUDGE.

The defendant company called as a witness H. U. MUDGE, who being duly sworn, testified as follows:

133 Direct examination by Mr. WALDO:

Q. What is your name?
A. Henry U. Mudge.
Q. What is your occupation?
A. Division superintendent of the Atchison, Topeka & Santa Fe Railroad Company.
Q. Where do you reside?
A. My office is in San Marcial.
Q. What was your position in the month of June, 1889?
A. The same as it is now.
Q. Superintendent of this road?
A. Yes, sir.
Q. What is your division?
A. My division at that time was from Wallace to El Paso.
Q. What positions have you held, Mr. Mudge, and what duties have you performed in connection with the operation of railroads?
A. That is quite a long list.
Q. Let us have it, please.
A. I have been track laborer, telegraph operator, brakeman, conductor, train-dispatcher, roadmaster, trainmaster and superintendent of the division.
Q. You have filled about all the places a man would fill who has risen from the ranks up to your place?
A. Yes, sir.
Q. In operating a railroad it becomes necessary, does it not, to use work-trains in and about the repair of the track?
A. It does.
Q. Will you please state to the jury just how such trains are operated, and state while you are doing it why you operate them in any particular way, in case you do?
134 A. They are operated with the engine at one end of the train and of course it is necessary to push one way and to pull the other way.
Q. Why is that necessary?
A. Because the train works simply between two stations and there is no way of getting from one end of the train to the other without pushing to some station.
Q. So that in performing its work it must either push or pull in going one way. It either must pull up and push back or it must push up and pull down?
A. Certainly.
Q. That is from the very necessity of the case, is it not?
A. Yes, sir; certainly.
Q. Now, Mr. Mudge, you say you have been a trackman?
A. Yes, sir.

Q. Were you ever a trackman on this road?
A. Yes, sir.
Q. How long ago was that?
A. About twenty years ago.
Q. Do you know whether or not the rules and regulations are substantially the same now as then—say, in June, 1889, as they were in the early days?

Mr. FIELD: I object, because the question calls for the opinion of the witness as to the contents, not only of the present rules, but of the rules of twenty years ago, and because he is asked whether he knows them to be the same as they were twenty years ago——
Mr. WALDO: I will withdraw the question.

Q. Do you know what the rules and regulations—do you know whether there were any rules or regulations prescribed for the government of section and track men, in force in June, 1889?
A. There were.
135 Q. Are those rules and regulations in writing or printing?
A. They are in printing.
Q. Have you those rules and regulations which were in force, say, in June, 1889?
A. I have.
Q. I want the rules and regulations covering the conduct of sectionmen. Will you please produce them?

(Witness produces papers.)

Q. Will you please read to the jury from that——

Mr. WALDO: We offer the rules in evidence.
Mr. FIELD: I object to the rules and regulations as evidence: First, because there is no evidence that the rules and regulations were ever communicated to the plaintiff in this case——
Mr. WALDO: It don't make any difference whether they were or not. I propose to show that the rules and regulations were circulated and given around among the various employés; whether they were communicated to this defendant, I do not know.
Mr. FIELD: You do not propose to show that any copy was communicated to this plaintiff?
Mr. WALDO: I do not believe I can show that.
Mr. FIELD: You do not believe you can show that the contents of these rules were ever communicated to this plaintiff, by any person?
Mr. WALDO: I do not believe I will be able to show by any man here that they were.
Mr. FIELD: I insist on the objection.
Mr. WALDO: I will see what I can show by this witness.

To the COURT:

Q. What are those rules and regulations put in that form for?
A. The government of employés.
136 Q. How are they distributed among the employés? Are they distributed among the employés?

A. Yes, sir; they are.

Q. To whom are they given among the employés?

A. They are given to all the trainmen, the engineers, conductors and brakemen, and to the track department. The supply is sent to the roadmaster and he distributes them among the foremen.

Q. They reach the foremen of the sections?

A. Yes, sir; a receipt is taken from each foreman.

Q. What are they given to the foreman for?

A. For the government of the employés who are working under him.

Q. Do you know whether or not these rules and regulations were ever communicated to the sectionmen on this road—of your own personal knowledge, I mean?

A. Not to my own knowledge.

Q. They are distributed to the foremen, whose duty it is to communicate them to these men?

A. Yes, sir.

Mr. FIELD:

Q. Is the duty of the foreman to communicate the contents of these rules and regulations to the sectionmen pointed out in the rules themselves?

A. In the rules themselves, I do not think it is.

Q. The section foreman was not supplied with a sufficient number of copies of these rules and regulations to give one to each section hand?

A. I cannot say for certain about that. They are supplied with a number of copies for distribution among the sectionmen. The roadmaster is supplied with a sufficient number and I think the foreman has several copies.

Q. Do you know that?

137 A. I would not say positively that they have—that the section foreman has more than one. I think they have, but I won't say certain.

Q. But you know, as a matter of practical knowledge with you as superintendent of this road, that there was no effort in your division to furnish each section hand with a copy of those rules and regulations?

A. I know that there was not so far as my part of it is concerned. I did not undertake to furnish each of these employés with a time-card.

By Mr. CHILDERS:

Q. That paper contains the time-card schedule for running of regular trains, does it not?

A. Yes, sir.

Q. And is it or not to be found in every station, for anybody who wants to look at it?

A. Yes, sir.

Q. And how about all work-trains, and all trains?

A. Yes, sir; on all trains.

Q. And it can be seen by anybody who wants to examine it?
A. Certainly.

By Mr. FIELD:

Q. By the public generally?
A. The figures are the same as the——
Q. I am talking about the rules——
A. He asked about the time-card.

By Mr. CHILDERS:

Q. I mean this publication about the rules.
A. That is not for the information of the public generally.
Q. But it may be found in any station, to be examined by any one having any direct interest in it?
A. Certainly.

By Mr. FIELD:

138 Q. Do you mean to say that they are open to inspection by the public on demand?
A. Any man who wants a copy of it can get it at any station; yes, sir.
Q. By just going and asking for it?
A. I think so; that is my understanding of it, and I ought to know.
Q. Did you ever know of any instructions given to anybody connected with the railroad company to distribute these things promiscuously to the general public upon demand?
A. I do not.
Q. You simply assume that anybody who went and asked for one could get it?
A. I know they could. I did not assume it.
Q. Do you provide a number of copies at each station for distribution to the public?
A. No, sir. We provide a number of copies at each station for distribution to employés.
Q. Is it always accessible to employés on demand? But the general public, I am asking about.
A. The public can get it if they have any interest in it or want it.

Mr. FIELD: I still insist on my objection.
The COURT: At this time I will allow the testimony to go in, subject to be stricken out hereafter.
Mr. FIELD: I insist, if your honor please, that the error in letting in improper testimony is not corrected by striking it out afterwards, and I desire the record to show my protest against the rules being read under that condition, and my exception to the ruling of the court.
Mr. WALDO: We are satisfied to have the record show that.

For the jury:

139 Q. Mr. Mudge, please read the numbers of the rules in regard to the sectionmen.

A. The rules to the sectionmen are not numbered; they are special rules.

Q. Read them, please.

A. (Reading:) "Section foreman, or reliable man, must pass over and examine their sections daily, and ascertain that the track, slopes, cuts and bridges are safe. This should be done in the morning.

"They must see that no lumber, wood, stone, material or tools are placed at any time within six feet of the rail.

"Before a rail or frog is taken out, or any obstruction is caused to the main track, or when any break or obstruction is discovered, the danger signal must be sent out in both directions, at least twenty telegraph poles from the point of danger, and a competent man must remain and keep it displayed until he is recalled by the foreman, which must not be done until the track is known to be safe.

"In stormy weather section foremen must be out with their men (day or night) with proper signals, and watch those places most liable to wash or be disturbed.

"It is also the duty of trackmen to put out fires set by engines, and to guard the property of others as well as that of the railroad company exposed to such fires, whether responsibility attaches to the company or not.

"Sectionmen will pay particular attention to the telegraph lines. In case the wires are found broken or on the ground, crossed or in any way obstructed, they must be repaired in a temporary manner immediately, and, where such repairs are impracticable, notice must be given to the nearest telegraph office by messenger or the earliest means practicable.

140 "At all times when work is going on which renders it necessary for trains to reduce speed, a green flag must be set at side of track at least twenty telegraph poles from the spot, on engineer's side, in each direction, as a caution to approaching trains to run slowly. After severe rains or a thaw, a hand car must be sent over the road before the passage of regular trains.

"Hand cars or other property belonging to the company must not be used except for the business of the company.

"Sectionmen must at all times hold themselves in readiness to aid in the passage of trains, and in case of accident must obey the orders of the conductor of the delayed train.

"Every man at work on the track must bear in mind that in operating the road under telegraph orders a train may pass at any moment.

"Section foremen must see that their gangs are supplied with the proper signal flags, lanterns, etc., and that they are thoroughly instructed as to their use.

"Section foremen must see that fences on each side of the road

and at crossings are in good order and that the cattle-guards are in repair. A break in a fence should not be overlooked, and when it cannot be repaired for want of material, the section foreman must give the roadmaster immediate notice of it, stating what material is required. When fences are taken down for any purpose, they must be replaced without unnecessary delay."

Cross-examination:

Q. Did you make a written report of this accident to anybody?
A. I believe I did.
Q. Look at that paper and state if that is it.
A. Yes, sir; that is evidently my signature.
Q. Will you read it to the jury?

141 Mr. WALDO: We object to it. We do not know what it contains, and it is a privileged communication. This servant cannot bind the company by any statement he might make that did not take place as part of the *res gestæ*.

Mr. FIELD: I will withdraw the offer. I do not care to take any chances about it.

DECEMBER 2ND.

Mr. WALDO: It is stipulated that the following admissions shall be inserted in the record:

It is admitted that Wallace, a station mentioned in the evidence, is a point about thirty miles north of Albuquerque, and that Alameda and Bernalillo are stations between Wallace and Albuquerque, Alameda being six miles from Albuquerque and Bernalillo eighteen miles, and that Isleta is a station on the line of defendant company about fourteen miles south of Albuquerque, and that Socorro is a station on the line of defendant company about seventy-five miles south of Albuquerque.

Mr. WALDO: That is the defendant's case.

Rebuttal.

Mr. FIELD: In rebuttal the plaintiff offers in evidence rules Nos. 70, 78, 104, 113, 120, 121, 128, and all that portion of the rules in reference to work-trains of the rules not numbered, which are read to the jury as follows:

70. The engine bell must be rung for a quarter of a mile before reaching every road crossing at grade, and until it is passed; and the whistle must be sounded at all whistling posts.

142 78. All signals must be used strictly in accordance with the rules, and trainmen and enginemen must keep a constant lookout for signals.

104. When a train is being pushed by an engine (except when shifting and making up trains in yards) a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger, and immediately signal the engineman.

113. Work-trains will be run as extras under special orders, and will be assigned working limits.

120. Conductors and enginemen will be held equally responsible for the violation of any of the rules governing the safety of their trains, and they must take every precaution for the protection of their trains, even if not provided for by the rules.

121. In all cases of doubt or uncertainty, take the safe course and run no risks.

128. Freight brakemen must be on top of their trains in approaching and passing stations and railroad crossings at grade. A trainman must always be on the rear car of each moving train.

A "work-train" is an extra, for which the above form will be used for a direct run in one direction. The authority to occupy a specified portion of the track, as an extra, while working, will be given in the following form:

Engine 292, conductor —— ——, will work as an extra from 6 a. m. until 7 p. m. between Berne and Turin.

The working limits should be as short as practicable, to be changed as the progress of the work may require. The above may be combined, thus:

143 Engine 292, conductor —— ——, will run extra (from Berne) to Turin, and work as an extra from 7 a. m. until 6 p. m. between Turin and Rome.

When an order has been given to work between designated points no other extra must be authorized to run over that part of the track without provision for passing the work-train.

When it is anticipated that a work-train may be where it cannot be reached for meeting or passing orders, it may be directed to report for orders at a given time and place, or an order may be given that it shall clear the track for a designated extra, in the following form:

Work-train 292, conductor —— ——, will keep clear of extra 223, west, conductor —— ——, between Antwerp and Brussels, after, 2.10 p. m.

In this case, extra 223 must not pass either of the points named before 2.10 p. m., at which time the work-train must be out of the way between those points.

When the movement of a working train over the working limits cannot be anticipated by these or other orders to the work-train, an order must be given to such extra to protect itself against the work-train, in the following form:

Extra 76, conductor —— ——, will protect itself against work-train extra 95, conductor —— ——, between Lyons and Paris.

This may be added to the order to run extra.

A work-train, when met or overtaken by an extra, must allow it to pass without unnecessary detention.

When the conditions are such that it may be considered desirable to require that work-trains shall at all times protect themselves while on working limits, this may be done under the follow-

144 ing arrangements: To example add the following words: protecting itself against all trains.

A train receiving this order must, whether standing or moving,

protect itself within the working limits (and in both directions on single track) against all trains, in the manner provided in rule 99.

When an extra receives orders to run over working limits, it must be advised that the work-train is within those limits by adding to example (*a*) the words:

Eng. 292, conductor —— ——, is working as an extra between Berne and Turin.

A train receiving this order must run expecting to find the work-train within the limits named.

Mr. FIELD: These rules are taken from Atchison, Topeka & Santa Fe Railroad Company's, Rio Grande division, supplement "F" to time-table No. 34, taking effect Sunday, June 30, 1889, and identified by witness Mudge.

Mr. FIELD: That is the case for the plaintiff.

And the foregoing was all the evidence introduced on the trial of this cause.

Mr. FIELD: The plaintiff asks the court to instruct the jury that, if they believe the evidence, they should find the issues for the plaintiff and as-ess his damages at such sum, not exceeding the sum of $10,000, the amount claimed in the declaration, as from the evidence they believe will compensate him for the injuries he received by reason of being struck by the railroad train of the defendant, and in assessing the plaintiff's damages they may take into consideration the extent of the plaintiff's injuries, the probable duration thereof, his loss of time and his bodily and mental suffering, and the effect of the injury upon his capacity to labor and
145 to earn a livelihood, and the expense, if any, incurred by him in endeavoring to have himself cured of the said injury; and if the jury believe from the evidence that the injuries of the defendant are permanent and will continue to affect his capacity to labor during the continuance of his life, the jury may consider these circumstances in connection with all the other facts and circumstances in the case in determining the plaintiff's damages; and upon the whole case the jury should assess the plaintiff's damages at such sum as will compensate him for the injuries sustained, not exceeding the sum of $10,000, the amount claimed in the declaration.

Mr. WALDO: The defendant moves the court to instruct the jury to find for the defendant, upon the ground that the negligence, if any, through which the defendant was injured, was the negligence of the fellow-servants of the plaintiff, for which the defendant is not liable. This motion we will put in writing and file.

Mr. FIELD: The record should show that I filed an amended declaration, at the proper time, by leave of the court, which is to be taken as traversed by the plea of the defendant already on file to the original declaration in the case, and the record is also to stand as though defendant had pleaded by a plea, good in form and substance, that the injuries sustained by the plaintiff were not sustained by reason of the negligence of the defendant, its agents and serv-

ants, but by reason of the negligence of the plaintiff himself contributing thereto. This, it is agreed, shall be inserted in the record in the proper place, where the plaintiff made his motion to amend the declaration.

Counsel argue the motions to instruct the jury.

DEC. 3, 1892.

146 The argument on the motions to instruct being concluded, the court rendered his opinion, and overruled both plaintiff's and defendant's motion, whereupon both plaintiff and defendant, by their respective counsel, duly excepted.

Counsel address the jury.

The court instructed the jury as follows:

This is an action of trespass, on the part of the plaintiff against the defendant, The Atchison, Topeka & Santa Fe Railroad Company, for damages for injuries alleged to have been committed upon the plaintiff while engaged in certain service for the defendant. The defendant pleads not guilty. This throws the burden of proof upon the plaintiff of the issues involved before you.

The defendant also pleads that the plaintiff contributed to the negligence by which he was injured. Upon this plea the burden of proof would be upon the defendant, and if you find by a preponderance of the evidence that the plaintiff, through his own negligence or carelessness, contributed to the injury of which he suffered—that is, that by his negligence he was the proximate cause of his injury and that with care he might have prevented that injury, and if you find this by a preponderance of the evidence, you will find the issues for the defendant.

If you find from the evidence that the plaintiff was employed by the defendant, through the instrumentality of its section foreman, to labor in the capacity of a section hand upon the line of the defendant's railroad, and that the plaintiff, in compliance with the command of the said section foreman, entered upon and into a hand car of the defendant on the morning of the 5th of June, 1889, for the purpose of going to his daily labor, and that while the plaintiff

147 was so going in and upon the said hand car a train of cars and locomotive engine propelled by steam power, operated by the agents and servants of the defendant, was run upon and over said hand car through the negligence or recklessness of the agents and servants of the defendant in charge of said train of cars and locomotive engine, and the plaintiff was thereby injured, and that the plaintiff at the time of receiving the said injury was exercising due care and caution to protect himself from injury, the jury should find the issues for the plaintiff and assess his damages at such sum as will compensate him for the injuries received, not exceeding the sum of ten thousand dollars, the amount of damages claimed in the declaration.

The court instructs you that where a train of cars is made up with the engine at the opposite end of the train from the direction in which the train is moving, and is being propelled by steam power at a rate of speed from 16 to 18 miles an hour, it is the duty

of the persons in charge of said train while the same is being so run in that position to station a reliable and competent man in a position where he can at all times communicate by signal with the engineer in charge of the engine backing the said train for the purpose of warning the engineer of any danger or obstruction which may appear on the track; and if the jury believe from the evidence that by the exercise of due care on the part of the persons in charge of said train, the situation of the plaintiff and his companions upon the hand car might have been discovered and the train stopped in time to prevent the accident, and that the agents and servants of the defendant company in charge of the movement of the said train failed or neglected to exercise such due care in the movement of the said train, and the plaintiff was thereby injured without fault on his part, the jury should find the issues for
148 the plaintiff and assess his damages at such sum as they believe from the evidence will compensate him for the injuries sustained, not to exceed the sum of ten thousand dollars.

The court instructs you that it is the duty of a railroad corporation to exercise ordinary care in the operation of its trains and locomotive engines propelled by steam power, to protect its section hands from injury thereby; and if the jury believe from the evidence that the agents and servants of the defendant company in charge of its train of cars and locomotive engine negligently failed to exercise due care in the management of the same, and the plaintiff without fault on his part was injured thereby, the jury should find the issues for the plaintiff, and assess his damages at such sum as will compensate him for the injuries sustained.

If the jury believe from the evidence that the plaintiff was employed by the defendant company, through its section foreman, to labor as a section hand on its track, and that by the terms of his employment the plaintiff was subject to the orders of said section foreman as to the time when and the place where he should labor, and if the defendant company provided a hand car upon which to transport the plaintiff and the witness Mares and the said section foreman to their daily labor and if the said section foreman negligently ordered the plaintiff and the witness Mares to go with him upon the said hand car on the 5th day of June, 1889, for the purpose of performing labor for the defendant company at a time and place when and where it was dangerous to go by reason of the fact that other agents and servants of the defendant company were then and there about to pass on and along the said track of the defendant company with a train of cars and locomotive engine propelled by steam power, and
149 if the said section foreman knew or by the exercise of ordinary care might have known of said danger, and if the said danger was unknown to the plaintiff and the said section foreman assured the plaintiff and the witness Mares that he, the said section foreman, would warn them of any danger that might arise from the passing of trains, the plaintiff had the right to rely on such assurance so given, and if, by reason of the failure or neglect of the section foreman to apprise himself of the approach of the defendant's

train of cars, and to warn the plaintiff of its approach, the plaintiff was run over and injured by the said train of cars of the defendant company, they should find the issues for the plaintiff, notwithstanding they may believe from the evidence that the plaintiff might but for said assurance of the section foreman have protected himself from the danger by the use of ordinary care, provided the jury shall believe from the evidence that the plaintiff relied on the assurance of said section foreman and by reason thereof failed to guard himself against danger arising from the approach of trains from the rear.

If the jury shall find the issues in this case for the plaintiff, they may, in assessing the plaintiff's damages, take into consideration the extent of the plaintiff's injuries and the probable duration thereof, his loss of time, and his bodily and mental suffering and the effect of the injury upon his capacity to labor and to earn a livelihood, and the expense, if any, incurred by him in endeavoring to have himself cured of the said injury, and if the jury shall believe from the evidence that the injuries of the plaintiff are permanent and will continue to affect his capacity to labor during the continuance of his life, the jury may consider these circumstances in connection with all the other facts and circumstances in the case in determining the amount of plaintiff's damages; and upon the whole case, the jury should, if they so find the issues for the plaintiff, assess his damage at such sum as will compensate him for the injuries sustained, not exceeding the sum of ten thousand dollars, the amount of damages claimed in the declaration.

You are the sole judges of the weight of the evidence and of the credibility of the witnesses, and if you believe from the evidence that any witness has willfully sworn falsely as to any material fact in the case, you may disregard the whole or any part of the testimony of such witness, and in passing upon the credibility of any witness or the weight to be given to his testimony, you may consider his manner and conduct upon the stand, his means of knowledge, his relation to the parties and the interest he may have in the result of the case.

If you find for the plaintiff, your verdict will be: We, the jury, find the issues for the plaintiff; and assess his damages at such sum as you may find, not to exceed the amount claimed in the declaration. If you find for the defendant, your verdict will be: "We, the jury, find the defendant not guilty." If you come to a verdict before the incoming of court this afternoon, you may seal up your verdict and give it to your foreman and be here to return it at two o'clock. If you should not come to a verdict before that time, the court will be in session all afternoon and receive your verdict.

The jury retire.

Mr. CHILDERS: We except to the charge of the court and his refusal to give instructions asked by defendant.

The COURT: Counsel on either side may have their exceptions noted and file them hereafter.

151 To the giving of each and all of which said instructions the defendant, by its counsel, then and there excepted.

And the defendant, by its counsel, then and there asked the court to give to the jury the following instructions, to wit:

The jury are instructed that, although they may believe from the undisputed facts in this case that the injury which the plaintiff suffered was caused by the negligence of the foreman of the hand car or by that of the persons in charge of the work-train which struck the hand car, or by both, nevertheless, all of these persons were fellow-servants of the plaintiff, for whose negligence the defendant is not responsible, and you should find the defendant not guilty.

But the court refused to give these instructions to the jury, to which decision of the court in refusing the same and each of them, the defendant, by its counsel, then and there excepted.

And the plaintiff, by counsel, then and there asked the court to instruct the jury further, as follows:

If the jury believe the evidence they should find the issues for the plaintiff and assess his damages at such sum, not exceeding the sum of ten thousand dollars, the amount claimed in the declaration, as from the evidence they shall believe will compensate him for the injuries sustained by reason of being struck by the railroad train of the defendant.

The court instructs the jury that it is negligence *per se* on the part of the agents and servants of a railroad company to run a train of cars and locomotive engine propelled by steam power backward at the rate from sixteen to eighteen miles an hour without at all times,

152 while the train is so running, maintaining means of immediate and prompt communication to the engineman of the knowledge of the existence of danger or obstruction on the track.

The court instructs the jury that the defendant company's trainmen in charge of its train of cars and locomotive engine propelled by steam power were not fellow-servants of the plaintiff engaged in the same common employment, but on the contrary thereof, the negligence of such trainmen or any of them, if proved in this case, is attributable to the defendant company.

The court instructs the jury that the defendant company's section foreman was not a fellow-servant of the plaintiff engaged in the same common employment, but on the contrary thereof, the negligence of such section foreman, if proved in this case, is attributable to the defendant company.

But the court refused to give these instructions to the jury, to which decision of the court in refusing to give the same and each of them, the plaintiff, by his counsel, then and there excepted and still excepts.

And thereupon, the jury rendered a verdict against the defendant; whereupon, the defendant, by its counsel, then and there moved the court to set aside the verdict so rendered and grant a new trial of this cause, and filed the following reasons in writing for its motion, to wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

JOAQUIN MARTIN
vs.
A., T. & S. F. R. R. Co. } No. 2931.

Motion for New Trial.

Now comes the defendant in the above-entitled cause, by its attorneys, H. L. Waldo and W. B. Childers, and moves the court
153 to set aside the verdict rendered in this cause and grant it a new trial for the following reasons, to wit:

1st. Because the court refused to sustain defendant's motion to instruct the jury to find a verdict in favor of the defendant and the defendant not guilty, but overruled said motion, to which action of the court defendant then and there excepted.

2nd. Because the court refused to instruct the jury, upon the request of the defendant, — not guilty or a verdict in favor of the defendant, to which refusal the defendant then and there excepted.

3rd. Because the court erroneously instructed the jury, upon the request of the plaintiff; to the giving of each and every one of said instructions the defendant then and there excepted.

4th. Because the court erroneously instructed the jury, of its own motion, to the giving of which said instructions the defendant then and there excepted.

5th. Because the court, over the objection of the defendant, admitted improper testimony on behalf of the plaintiff and at the instance of the plaintiff in said cause, to the admission of which the defendant then and there excepted.

6th. Because the court refused to admit proper testimony offered by the defendant in its behalf, to the action of the court in excluding which said testimony the defendant then and there excepted.

7th. Because the verdict rendered in behalf of the plaintiff is excessive and the amount of damages as fixed by the jury largely in excess of what would reasonably compensate the plaintiff for the injury received.

8th. Because the said verdict is contrary to the law applicable to said cause.

154 9th. Because the said verdict is contrary to the evidence admitted in said cause.

10th. Because the said verdict is contrary to both the law and the evidence admitted upon the trial of said cause.

11th. Because the court erroneously permitted said plaintiff to amend his declaration, over the objection of the defendant.

12th. Because the court erroneously refused to continue said cause after permitting the plaintiff to amend the declaration therein, over the protest of the defendant, thereby compelling the defendant to go to trial without any opportunity to prepare for trial upon

the new issue raised in said cause by the amendment made to said declaration.

13th. And for many other good and sufficient causes apparent upon the record of the testimony of the trial of said cause.

H. L. WALDO AND
W. B. CHILDERS,
Attorneys for Defendant.

(Endorsed:) No. 2931. Territory of New Mexico, county of Bernalillo. In the district court, second judicial district. Joaquin Martin, plaintiff, *versus* A., T. and S. F. R. R. Co., defendant. Motion for new trial. Filed in my office Dec. 6, 1892. Chas. F. Hunt, clerk. H. L. Waldo and William B. Childers, attorneys for defendant.

155 But the court denied the motion and gave judgment upon the said verdict against the defendant; to which decision of the court in denying such motion the defendant, by its counsel, then and there excepted.

And forasmuch as the matters above fully set forth do not fuliy appear of record, the defendant tenders this its bill of exceptions, and prays that the same may be signed and sealed by the judge of this court, pursuant to the statute in such case made, which is done accordingly, this 27th day of May, A. D. 1893.

WM. D. LEE, *Judge.*

(Endorsed:) No. 2931. Territory of New Mexico, county of Bernalillo. In the district court, second judicial district. Joaquin Martin, plaintiff, *vs.* A., T. & S. F. R. R. Co., defendant. Proposed bill of exceptions, tendered in open court for signature of the judge, in presence of counsel for pl'ff, on the 16th day of May, A. D. 1893. Chas. F. Hunt, clerk. Filed in my office May 27th, 1893. Chas. F. Hunt, clerk. William B. Childers and H. L. Waldo, attorneys for defendant.

TERRITORY OF NEW MEXICO, }
Second Judicial District, County of Bernalillo. }

I, Chas. F. Hunt, clerk of the second judicial district court
156 of the Territory of New Mexico, in and for the county of Bernalillo, do hereby certify that the foregoing is a true and correct copy and transcript of all the pleadings and proceedings in a cause lately pending in said district court, wherein Joaquin Martin was plaintiff and The Atchison, Topeka and Santa Fe Railroad Company was defendant, as the same remains of record and on file in my said office.

[SEAL.] Witness my hand and the seal of said court this 8th day of June, A. D. 1893.

CHAS. F. HUNT, *Clerk.*

157 And afterwards, to wit, on the 31st day of July, 1893, there was filed in the office of the clerk of the supreme court of the

Territory of New Mexico an assignment of errors; which said assignment is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, 1893.

THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, Plaintiff in Error, *versus* JOAQUIN MARTIN, Defendant in Error.	Error to District Court, Bernalillo County.

Assignment of Errors.

And the said Atchison, Topeka and Santa Fe Railroad Company now comes and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

158 First assignment.

The court erred in permitting the plaintiff to amend his declaration during the course of the trial, over the objection of the defendant.

Second assignment.

The court erred in refusing to continue said cause after permitting the plaintiff to amend his declaration, over the objection of the defendant, and thereby compelling defendant to go to trial without any preparation or opportunity to prepare for trial upon the new issue raised in said cause by the amendment made to such declaration.

Third assignment.

159 The court erred in admitting, over the objection of the defendant, improper testimony in behalf of the plaintiff, at the instance of the plaintiff in said cause.

Fourth assignment.

The court erred in refusing to admit proper testimony offered by the defendant in its behalf.

Fifth assignment.

The court erred in refusing the defendant to put proper questions to plaintiff on cross-examination.

Sixth assignment.

The court erred in entering judgment on the verdict of the jury, which was contrary to the law applicable to said cause.

Seventh assignment.

The court erred in entering judgment on the verdict of the jury, which was contrary to the evidence admitted in said cause.

Eighth assignment.

The court erred in not sustaining defendant's motion to instruct the jury to find a verdict in favor of the defendant and the defendant not guilty.

Ninth assignment.

The court erred in refusing to instruct the jury, upon the request of the defendant, to find the defendant not guilty or a verdict in favor of the defendant.

Tenth assignment.

The court erred in permitting the verdict for an excessive amount to stand and in entering thereupon a judgment for an excessive amount against the defendant.

160 Eleventh assignment.

The court erred in instructing the jury as follows:

"If you find from the evidence that the plaintiff was employed by the defendant, through the instrumentality of its section foreman, to labor in the capacity of a section hand upon the defendant's railroad, and that the plaintiff, in compliance with the command of the said section foreman, entered upon and into a hand car of the defendant on the morning of the 5th of June, 1889, for the purpose of going to his daily labor, and that while the plaintiff was so going in and upon the said hand car a train of cars and locomotive engine, propelled by steam power, operated by the agents and servants of the defendant, was run upon and over said hand car, through the negligence or recklessness of the agents and servants of the defendant in charge of said train of cars and locomotive engine, and the plaintiff was thereby injured, and that the plaintiff at the time of receiving the injury was exercising due care and caution to protect himself from injury, the jury should find the issues for the plaintiff and assess his damages at such sum as will compensate him for the injuries received, not exceeding the sum of ten thousand dollars, the amount of damages claimed in the declaration."

Twelfth assignment.

The court erred in giving to the jury the following instruction:

"The court instructs you that where a train of cars is made up with the engine at the opposite end of the train from the direction in which the train is moving, and is being propelled by steam power at a rate of speed from sixteen to eighteen miles an hour, it is the duty of the persons in charge of said train while the same is being so run in that position to station a reliable and competent man in a position where he can at all times communicate
161 by signal with the engineer in charge of the engine backing the said train for the purpose of warning the engineer of any danger or obstruction which may appear on the track; and if the jury believe from the evidence that by the exercise of due care

on the part of the persons in charge of said train, the situation of the plaintiff and his companions upon the hand car might have been discovered and the train stopped in time to prevent the accident, and that the agents and servants of the defendant company in charge of the movement of the said train failed or neglected to exercise such due care in the movement of the said train, and the plaintiff was thereby injured without fault on his part, the jury should find the issues for the plaintiff and assess his damages at such sum as they believe from the evidence will compensate him for the injuries sustained, not to exceed the sum of ten thousand dollars."

Thirteenth assignment.

The court erred in giving the following instruction to the jury:

"The court instructs you that it is the duty of a railroad corporation to exercise ordinary care in the operation of its trains and locomotive engines propelled by steam power, to protect its section hands from injury thereby; and if the jury believe from the evidence that the agents and servants of the defendant company in charge of its train of cars and locomotive engine negligently failed to exercise due care in the management of the same, and the plaintiff without fault on his part was injured thereby, the jury should find the issues for the plaintiff, and assess his damages at such sum as will compensate him for the injuries sustained."

Fourteenth assignment.

The court erred in giving the following instruction to the jury:

162 "If the jury believe from the evidence that the plaintiff was employed by the defendant company, through its section foreman, to labor as a section hand on its track, and that by the terms of his employment the plaintiff was subject to the orders of said section foreman as to the time when and the place where he should labor, and if the defendant company provided a hand car upon which to transport the plaintiff and the witness Mares and the said section foreman to their daily labor and if the said section foreman negligently ordered the plaintiff and the witness Mares to go with him upon the said hand car on the 5th day of June, 1889, for the purpose of performing labor for the defendant company at a time and place where and when it was dangerous to go by reason of the fact that other agents and servants of the defendant company were then and there about to pass on and along the said track of the defendant company with a train of cars and locomotive engine propelled by steam power, and if the said section foreman knew or by the exercise of ordinary care might have known of said danger, and if the said danger was unknown to the plaintiff and the said section foreman assured the plaintiff and the witness Mares that he, the said section foreman, would warn them of any danger that might arise from the passing of trains, the plaintiff had the right to rely on such assurance so given, and if, by reason of the

failure or neglect of the section foreman to apprize himself of the approach of the defendant's train of cars, and to warn the plaintiff of its approach, the plaintiff was run over and injured by the said train of cars of the defendant company, they should find the issues for the plaintiff, notwithstanding they may believe from the evidence that the plaintiff might but for said assurance of the section foreman have protected himself from the danger by the use of ordinary care, provided the jury shall believe from the evidence that the plaintiff relied on the assurance of said section foreman
163 and by reason thereof failed to guard himself against danger arising from the approach of trains from the rear."

Fifteenth assignment.

The court erred in overruling defendant's motion for a new trial.

Sixteenth assignment.

The court committed divers other errors apparent upon the face of the record.

164 Wherefore the said Atchison, Topeka and Santa Fe Railroad Company prays that the said judgment may be reversed, annulled, and held for nothing, and that judgment be rendered in this court as the law and the nature of the case requires.

W. B. CHILDERS,
HENRY L. WALDO,
Attorneys for Plaintiff in Error.

165 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, *negun* and held at Santa Fé, New Mexico, the seat of government of said Territory, on the last Monday of July, A. D. 1893, the same being Monday, July 30, 1893, the following, among other, proceedings were had, to wit:

ATCHISON, TOPEKA AND SANTA FE RAILROAD, Pl'ff in Error, *vs.* JOAQUIN MARTIN, Def't in Error.	535. Error to District Court of Bernalillo County.

Now comes the said defendant in error and moves the court, for reasons set forth in his motion on file, to quash the writ of error heretofore issued herein, and said motion, being argused by N. B. Field, Esq., for defendant in error, and by H. L. Waldo and W. B. Childers, Esquires, for plaintiff in error, is submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit, at the regular term of said court last aforesaid, on the ninth day thereof, the same being Thursday, August 10, 1893, the following, among other, proceedings were had, to wit:

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, Pl'ff in Error,
vs.
JOAQUIN MARTIN, Def't in Error,
} 535. Error to District Court of Bernalillo County.

This cause coming on upon the motion of said defendant in error to quash the writ of error herein, heretofore argued and taken under advisement by the court, the court, being now sufficiently advised in the premises, denies said motion. It is therefore ordered by the court that said motion be, and the same hereby is, denied.

And afterwards, to wit, at the regular term of said court last aforesaid, on the fifteenth day thereof, the same being Thursday, August 17, 1893, the following, among other, proceedings were had, to wit:

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, Pl'ff in Error,
vs.
JOAQUIN MARTIN, Def't in Error,
} 535. Error to District Court of Bernalillo County.

166 This cause, coming on for hearing upon the transcript of record, assignment of errors, and briefs of counsel on file, is argued by H. L. Waldo, Esq., for plaintiff in error, and N. B. Field, Esq., for defendant in error, and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, at the regular term of said court last aforesaid, on the twenty-third day thereof, the same being Saturday, August 26, 1896, the following, among other, proceedings were had, to wit:

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, Pl'ff in Error,
vs.
JOAQUIN MARTIN, Def't in Error.
} 535. Error to District Court of Bernalillo County.

This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Seeds, reversing the judgment of the court below, Associate Justices Freeman and Fall concurring, Chief Justice O'Brien dissenting, for reasons set forth in the opinion of the court, on file. It is therefore considered and adjudged by the court that the judgment of the district court in and for the county of Bernalillo, whence this cause came into this court, be, and the same hereby is, reversed, and that this causse be, and the same hereby is, remanded to said district court with directions to grant a new trial thereof; and it is further considered and adjudged by the court that the said Atchison, Topeka and Santa Fe Railroad Company do have and recover of said

Joaquin Martin its costs in connection with the suing out of the writ of error herein, as well in the court below as in this court, to be taxed, and that it have execution therefor.

And afterwards, at the regular term of said court last aforesaid, on the twenty-sixth day thereof, the same being Saturday, September 30, 1893, the following, among other, proceedings were had, to wit:

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, Pl'ff in Error, *vs.* JOAQUIN MARTIN, Def't in Error.	535.	Error to District Court of Bernalillo County.

Now comes the said defendant in error, by his attorney, N. B. Field, Esq., and moves the court to modify its judgment entered herein upon a former day of the present term, remanding this cause to the court below with instructions to grant a new trial
167 thereof, and in lieu thereof, for the purpose of facilitating the suing out of a writ of error by said defendant in error from the Supreme Court of the United States, this court do now enter final judgment against said defendant in error; and the court, being sufficiently advised in the premises, grants said motion. It is therefore considered and adjudged by the court that said motion be, and the same hereby is, granted, and that the judgment of this court rendered herein upon a former day of the present term, so far as it relates to the remanding of this cause to the court below with directions to grant a new trial thereof, be set aside and altogether held for naught; that the judgment in this cause of the district court in and for the county of Bernalillo be reversed, and that the plaintiff in error do have and recover of said defendant in error its costs in this behalf expended, as well in the court below as in this court, to be taxed, and that it have execution therefor.

And heretofore, to wit, on the 26th day of August, 1893, there was filed in the office of the clerk of said court the opinion of the judges of said court in said cause, a copy of which is hereunto annexed in accordance with the amendment to rule 8th of the Supreme Court of the United States, to be herewith transmitted, which is in words and figures as follows, to wit:

168 In the Supreme Court of New Mexico, July Term, 1893.

THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, Pl'ff in Error, *vs.* JOAQUIN MARTIN, Def't in Error. } Error to the District Court of Bernalillo County.

Henry L. Waldo and W. B. Childers, for plaintiff in error.
Neill B. Field, for defendant in error.

Opinion.

SEEDS, *J.:*

This is an action of trespass on the case brought by the defendant in error against The Atchison, Topeka & Santa Fe Railroad Company, the plaintiff in error, for certain injuries caused him by the negligence of the said railroad company. There was a trial to a jury, verdict in favor of the defendant in error for the sum of eight thousand dollars, and judgment upon the verdict. The railroad company brings the case here by writ of error.

The plaintiff in error made a number of assignments of error, but it is only necessary to consider the eighth and ninth in order to pass upon the real questions presented by the record. Those assignments are:

"The court erred in not sustaining defendant's motion to instruct the jury to find a verdict in favor of the defendant and the defendant not guilty."

"The court erred in refusing to instruct the jury, upon the request of the defendant, to find the defendant not guilty or a verdict in favor of the defendant."

There is a contention made in the case that as the exceptions to the court's instructions were not made until after the jury retired, and then not specifically to each instruction, this court will not consider them; but as the plaintiff in error asked various instructions which present the questions desired to be passed upon,
169 and these instructions were refused and properly excepted to at the time, there will be no necessity to pass upon the question of practice raised by the defendant in error.

The plaintiff in error asked the following instruction, which was refused:

"The jury are instructed that although they may believe from the undisputed facts in this case that the injury which the plaintiff suffered was caused by the negligence of the foreman of the hand car or by that of the persons in charge of the work-train which struck the hand car, or by both, nevertheless all of these persons were fellow-servants of the plaintiff, for whose negligence the defendant is not responsible, and you should find the defendant not guilty."

The exception to this refusal properly brings before us the legal question presented upon the facts of the record. The refusal to give this instruction necessarily involved the assumption that the court gave an instruction which did not sustain this view of the case. Without passing upon the question whether the exception is

properly saved by the court's instruction upon the point covered by the instruction asked by the plaintiff in error and refused I will set the ruling out that it may be seen in connection with the above refused instruction.

"If you find from the evidence that the plaintiff was employed by the defendant, through the instrumentality of its section foreman, to labor in the capacity of a section hand upon the defendant's railroad, and that the plaintiff, in compliance with the command of the said section foreman, entered upon and into a hand car of the defendant on the morning of the fifth of June, 1889, for the purpose of going to his daily labor, and that while the plaintiff was so going in and upon the said hand car a train of cars and locomotive engine propelled by steam power, operated by the agents and servants of the defendant, was run upon and over said hand car, through the negligence or recklessness of the agents and servants of the defendant in charge of said train of cars and locomotive engine, and the plaintiff was thereby injured, and that the plaintiff *was thereby injured and that the plaintiff* at the time of receiving the injury was exercising due care and caution to protect himself from injury, the jury should find the issues for the paintiff and assess his damages at such sum as will compensate him for the injuries received, not exceeding the sum of ten thousand dollars, the amount of damages claimed in the declaration."

The facts proven upon the trial were substantially as follows: The plaintiff below, Martin, at the time of the accident was in the employ of the Atchison, Topeka & Santa Fe Railroad Company as a sectionman and had been for three months. It was his duty with its foreman and others *to aid in repairing the railway.* Upon the day of the accident he and his foreman and one other laborer left Albuquerque on the hand car in the morning to go to their place of work north of Albuquerque; that he took his position upon the hand car in such a manner as to have his face looking south, but was ordered by his foreman to turn and face north. The third man on the car made some remark that a train was coming out of Albuquerque. The foreman said he would look out for
170 trains. The foreman was in charge of a section gang and hired the men, directed when they ought to be discharged, and where they should work upon the section, but he also worked in the same way as did the other men, and had nothing to do with paying the men. There was upon the line of the defendant's railroad between Socorro and Wallace at the time of the accident a work-train which was engaged in *aiding in repairing the railway.* It was under the management and control of a conductor, and at the time of the accident there was upon the train a roadmaster, who had control of the line of raod where the accident occurred. The work-train, shortly after the hand car left the station, also left Albuquerque for the north, backing the train, and overtook the hand car, running into it, knocking it from the track and seriously injuring the plaintiff Martin. Where the accident occurred was in a level country, and the track could be seen plainly for a long distance.

It may be conceded that the accident was caused by the joint

negligence of the conductor and engineer upon the work-train and the foreman upon the hand car, while it would seem that there was no excuse or reason for Martin to entirely rely upon the foreman to look out for trains, and thus to excuse himself from ordinary precaution in affairs of so much possible hazard, yet, as the question of contributory negligence was before the jury and they found there was none upon the part of Martin, there is nothing before us but the admitted negligence of the company's servants and its relation to the parties to this record. It is absolutely necessary for a proper consideration of the legal questions presented by this record to thoroughly eliminate all possible collateral questions. Corporations of every character and kind must, necessarily, act through and by means of agents, yet the corporation is not bound to respond for every negligent act of those agents. The corporation owes to its employés certain positive and personal duties, such as seeing that they have safe and proper tools and other appliances to work with; that their fellow-servants are carefully selected and competent to perform the work assigned them, and the company is bound to use ordinary care and diligence to see that these requisites are met.

But there is no question before us upon these phases of a master's liability to the servant. As far as this record shows, the company has faithfully performed its duties to this plaintiff in these requisites.

There is but the single question before us, Was the plaintiff
171 below and the other servants of the company, whose negligence caused the injury, fellow-servants? If they were, then the ruling of the lower court was erroneous and must be reversed. If they were not, then the verdict was proper and the judgment must stand. It is now the recognized law of the land, both in the State and in the Federal courts, that the master is not liable to a servant for the negligence of a fellow-servant unless the negligence was caused by the personal wrong of a master or his contributory negligence in the given case.

Farwell *v.* Boston & Worcester Railroad Co., 4 Met., 49.
Randall *v.* Baltimore & Ohio R. R. Co., 109 U. S., 478.
Chicago, Mil. & St. Paul R. R. Co. *v.* Ross, 112 U. S., 377.
Hough *v.* Railway Co., 100 U. S., 213.

The reason given for this exemption is thus stated by Chief Justice Shaw in Farwell *v.* Boston & Worcester R. R. Co., 4 Met., 49:

"The general rule resulting from considerations, as well of justice as of policy, is that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal contemplation the compensation is adjusted accordingly; and we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can effectually guard, as the master. They are perils incident to the service and which can be as dis-

tinctly foreseen and provided for in the rate of compensation as any other."

It is true that both upon the grounds of logic and fact the reason as here given has been vigorously attacked, the attack varying in intensity and completeness in proportion to the feeling of antipathy which the writer bore corporations because of their greediness or heartlessness; but whether logically sound or true in fact, the reason of Chief Justice Shaw is still the basis upon which the rule is generally founded. The difficulty has not grown out of the unsoundness of the reason for the rule, but out of the inability to apply the rule itself to the infinite variety of facts which are constantly presenting themselves. The question is, "Who, within the sense of the rule or upon grounds of public policy, are to be deemed fellow-servants in the same common adventure or undertaking?"

Hough *v.* R'y Co., 100 U. S., 213.

While many courts have essayed to give certain criteria by which to solve the question here presented, hardly any of acknowledged authority have endeavored to lay down a hard and fast formula by which all cases may be tested. The United States Supreme
172 Court has refused to make any such attempt. See the cases above cited. That court has been exceedingly conservative in its enunciation of general rules. The same remarks apply to the majority of State courts. The result was inevitable, therefore, that the cases should be in irreconcilable conflict.

It has been held that the following persons were fellow-servants: Foreman of a bridge gang and servants of operating train, Elliott *v.* Railroad Co., 5 Dak., 523, 41 N. W. Rep., 758; a section foreman and conductor, Fagundes *v.* Railroad Co., 79 Cal., 97, 21 *Pa.* Pac. Rep., 437; a laborer employed to remove snow from the track and a conductor, Baughman *v.* Superior Court, 72 Cal., 573, 14 Pac. Rep., 207; a brakeman and conductor of different trains, Van Wickle *v.* Railroad Co., 32 Fed. Rep., 278; a track-repairer and an engineer, McMasters *v.* Railroad Co. (Miss.), 4 So. Rep., 59; a sectionman and an engineer or brakeman, Howard *v.* Railway Co., 26 Fed. Rep., 837; a switchman of one train and the engineer of another train, Randall *v.* Baltimore & Ohio R'y Co., 109 U. S. The number of cases might be greatly extended, but it is unnecessary. It will be noticed that the relation existing in each case is, in principle, the same as the relation existing in the case before us, between the plaintiff Martin and the engineer or conductor of the work-train. In the Randall case, *supra*, the court says that for the purposes of that case it was not necessary "to undertake to lay down a precise and exhaustive definition of the general rule in this respect or to weigh the conflicting views which have prevailed in the courts of the several States, because persons standing in such a relation to one another as did this plaintiff and engineman of the other train are fellow-servants according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the House of Lords and the English and Irish courts;" and Judge Gray, who delivered the opinion, cited a long line of authori-

ties sustaining the view taken by the court. Continuing, he said, referring to the servants in the case before him, "They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. The separate services have an immediate common object, the moving of trains. Neither works under the orders or control of the other. Each by entering into his character of services takes the risk of
173 the negligence of the other in performing his service, and neither can maintain an action for an injury caused by such negligence against the corporation, their common master." It seems to me clear that the principle of this case fairly and squarely covers the facts in the case before us upon that branch of it relating to the negligence of the conductor or engineer upon the work-train, and that being the utterance of the Supreme Court of the United States we are bound by it. Whatever may be the exact status of the Ross case, 112 U. S., and its authority, which we will consider later, it has no reference to the state of facts that existed between the plaintiff and the conductor and engineer of the work-train. They were fellow-servants, and, being such, the common master is not responsible in damages to the plaintiff for the negligence of such fellow-servants. That negligence was part of the risk he assumed.

It was argued strenuously by counsel for defendant in error that as the work-train and sectionmen were under one common direction or employment in the repairing of the road, and the common superintendent sent them to the place of work, that it was his duty to see that the work-train did not run down and kill the sectionmen upon the hand car; and failing in so doing, and being the representative of the company, its vice-principal, the company is responsible for the negligence of the trainmen upon the work-train. But, in our judgment, the record discloses no state of facts upon which such a contention can be predicated. The men upon the hand car were going to their work earlier than usual and of their own volition. They were going presumably, as they had been going for three months, over a line of railroad upon which were constantly passing trains. The work-train was running in accordance with telegraphic orders, as to which orders there is no intimation of negligence, and the men upon the hand car knew that there was an order of the company providing: "Every man at work on the track must bear in mind that in operating the road under telegraph orders a train may pass at any moment." This abundantly shows that there was no negligence upon the part of the company by reason of any negligence of a superior servant controlling the operations of the men upon both the work-train and the hand car. No superior servant invited the men upon the hand car to go upon the railroad with any promise that the road would remain clear of trains until they reached their destination, and then telegraphed a
174 work-train to the same place to run the men to their death.

It may be urged that the testimony does not show that the plaintiff below knew of the rule above set out; but the foreman did,

and if he negligently forgot to inform the plaintiff it is such negligence as may be considered upon the question as to the company's liability for *his* negligent acts, but not upon the point now being considered.

We now come to the consideration of the question, Was the relation existing between the foreman of the section hands and the plaintiff below that of fellow-servant? There are numerous cases in the books holding that though the foreman is a superior in some matters, as, for instance, in direction of general work, and even in power to hire the men who work with him, he is simply a fellow-servant in a different grade, and that the difference in grade does not destroy the relation of fellow-servant so as to bind the common master for the negligence of the foreman.

Ell *v.* Northern Pac. R'y Co., 48 N. W., 222.
Olson *v.* R'y Co., 38 Minn., 117.
Lindval *v.* Woods, 42 N. W., 1020.

In the last-cited case the court say: "In Brown *v.* R'y Co., 27 Minn., 162, it was held that the difference in *grade* of employment or in authority with respect to each other does not remove employés from the class of fellow-servants as regards the liability of the master for the injuries to one caused by the negligence of the other; and in speaking in that case of the basis upon which this rests it is said: 'If the servant is supposed to assume the risks which the master with due care and diligence cannot prevent, * * * then he assumes the risks from negligence of those servants who may be placed over him as superior servants or overseers as well as those of equal grade with himself, for in respect to such overseers or superior servants the master, when he has used due care in selecting them, cannot prevent their casual negligence any more than he can prevent the casual negligence of those inferior in grade.'"

The case of Ell *v.* Northern Pac. R'y Co., *supra*, was that of a servant suing the company for the negligence of the foreman of the gang doing the work where the injury occurred. That case is a well-considered one and presents the argument in favor of the contention of the company with much learning and logical power. The court says:

"The foreman, Withnell, through whose negligence it is insisted that plaintiff was injured, had control of the gang employed on the work and was vested with *authority to employ and discharge*
175 *the men* who were subject to his direction and supervision. Hence it is urged that he was in his position, and therefore in the prosecution of the work of unloading these piles, a vice-principal, and not a fellow-servant."

It is noticeable that this case is almost on all fours with the one before us, and the contention is the same in both cases. The court, continuing, lays down the two rules representing the two doctrines by which courts have endeavored to ascertain, from a given state of facts, if the servants were fellow-servants, and say:

"Here lies the difference between the two rules. The cases which

preserve the fellow-servant rule in its full integrity bring the facts of each case to the test, not of the *rank* of the negligent servant, but of the *character* of the negligence from which the damage results. Did the master owe to his servant a duty *as master?* Answer the inquiry in the affirmative and he cannot escape a careless discharge of *that* duty by shifting the burden to the shoulders of a servant, however inferior his position may be. The negligence of a fellow-servant has not wrought injury in such a case. It is the negligence of the master himself, because that was carelessly done which he was bound to have carefully performed. The master must use due care in supplying his servants with safe appliances and in providing them a safe place to work. These are duties of the master. They are none the less his duties because from the necessities of business or for other reasons he confides their discharge to an employé. His personal negligence in this respect would create liability. * * * On the other hand, the other doctrine"—that is, the doctrine that the master's liability is determined by the *station* of the negligent servant—"is a limitation—a very important limitation—of that rule. It finds no warrant in the cases which first enunciated that rule. It rests on no subsequent legislation, and we are firm in the conviction that the mere *superiority* in the rank of the negligent servant, his right to control the servant injured and to employ and to discharge him, calls for no modification of the fellow-servant rule. The bed rock of that doctrine is that every employé assumes the risk of his coemployees' negligence as one of the ordinary risks of his work."

The court then enters into a clear and exhaustive consideration of the reasons why the doctrine as here laid down is correct in principle, and cites numerous cases to show that a great preponderance of authority is in favor of the doctrine as held by that court, and then concluded as follows:

"We believe that the fellow-servant rule should hedge about all masters without discrimination; that its wise and just barrier against liability should not be broken down by a fiction; that those whose business, from its very nature, necessitates gradations of service should not be deprived of its protection on account of a distinction which in no manner affects the considerations which gave it birth and have led to its almost universal adoption. We see nothing to justify the limitation doctrine except the increased safety of employés in a dangerous business, and this applies, if at all, equally to cases where the two servants are of the same grade."

We have quoted thus fully from this case because the facts are quite similar to those in the case before us; and, further, because the learned judge has presented the reasons for the general rule in the most convincing manner possible. The rule thus ably set forth is the one adopted by the great majority of States and having the endorsement generally of the Federal courts and the United States Supreme Court, until, at least, the announcement of the
176 Chicago, Milwaukee & St. Paul R'y Co. *v.* Ross, 112 U. S. 377; Randall *v.* Baltimore & Ohio R. R. Co., 109 U. S., 478. The doctrine as above laid down, how-ver, had been rejected by

the courts of Ohio, Michigan, Kentucky, and a few others, and in those jurisdictions the liability of the master had been *guaged* by the departmental test or the grade test, with a constantly growing tendency to increase the number and character of the departments or grades and thus in fact annihilating the fellow-servant doctrine or making of it a barren abstraction.

When the United States Supreme Court in 1884 announced the doctrine of the Ross case the legal profession and all masters were startled, not at the decision itself, for while, as to the facts in that case even, it was a departure from the apparent direction of the doctrine of the case of Randall *v.* Baltimore & Ohio R'y Co., 109 U. S., 478, yet as applied to its facts it was not devoid of justice, but the reasons and the citations of authorities both tended in the direction of the rule which was surely emasculating the fellow-servant doctrine and basing the master's liability solely upon negligence of *any* servant. The facts of the Ross case were these: A freight train was going south upon the railroad under the control of a conductor; a gravel train was coming north; at a station a few miles from the point where the two trains ought to pass the conductor of the freight train received a telegram instructing him where to allow the gravel train to pass; he neglected to give the engineer the order, by reason of which there was a collision and the engineer was injured; he sued the company for damages. The lower court gave the jury the following instruction: "It is very clear, I think, that if the company sees fit to place one of its employés under the control and direction of another that then the two are not fellow-servants engaged in the same common employment within the meaning of the rule of law of which I am speaking." It must be conceded that if the court had fully endorsed that instruction that in every case where one servant is under any control and direction of another the rule of fellow-servant would not apply. The case before us would be one under the spirit of the Ross case. But the court very carefully limited its ruling to the alleged facts in that case. Justice Field says: "We agree with them"—the courts of Ohio and Kentucky—"in holding, and the present case requires no further decision, that the conductor of a railroad train, *who commands its*
177 *movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management* of it and control over the persons employed upon it, represents the company, and therefore that for injuries resulting from his negligent acts the company is responsible." The justice in applying this rule says the language of the construction may be open to verbal criticism, and it certainly is, for it takes no great acumen to see that the learned judge imports into the construction a variety of facts not covered by the words of the instruction "control and direction," facts, too, that must have been assumed, for it is a matter of common notoriety that no conductor has the authority or performs the acts set out in the quotation italicised. In the very case itself the negligence is predicated upon the failure of the conductor to deliver an order, not *his* order, from another and higher servant, without which he could not move the train a foot. The decision

in this case was not agreed to by four of the justices upon the ground that they thought the conductor and engineer fellow-servants; however, the case stood as an authority for the principle that in cases where one servant has *any* control or direction over another that the fellow-servant doctrine does not apply, and if that *is* the meaning of the case, and it is now an authority for that view of this legal doctrine, then it is decisive of the case before us, as we are bound by the decisions of the Supreme Court of the United States; but the plaintiff in error cites the case of Baltimore & Ohio Railroad Co. *vs.* Baugh, 149 U. S., 368, as conclusive of the proposition before us, and that in its favor. This later case is the latest utterance of the Supreme Court upon the fellow-servant doctrine, and its authority, whatever it is, is decisive of the present case. The defendant in error insists that it does not change the doctrine announced in the Ross case, while the plaintiff in error insists that if it does not change the doctrine there put forward that it interprets the holding to be in accordance with the view if the law which it contends for and which it insists is the law of the Federal jurisdiction. What, then, does the Baugh case hold and what is its relation to the Ross case? Referring to the last question first, we remark that a previous decision of a court may be considered afterwards in four separate phases: 1st, it may be overruled and repudiated; 2nd, it may be made the basis of the second or other ruling without more; 3rd, it may be distinguished, and, 4th, it may be interpreted in accordance with the later and fuller discussion of the rule of law under consideration. The Baugh case plainly shows that
178 neither the first -or second phases were perused in reference to the Ross case. The discussion by Justice Brewer in the Baugh case shows that he was not attempting to discriminate the cases, for in principle they were too near alike, but that he was following the fourth method and endeavoring to place its somewhat disturbing holding upon such a practical basis as the Baugh case was about to lay down. It would seem, therefore, that the doctrine as now held by the Supreme Court is to be found solely in the Baugh case, and that it is unnecessary to further consider the Ross case, for, if that case is authority, it is so only because it harmonizes with the Baugh case. Differing from the usual course, the Baugh case is not an *additional* authority depending upon the Ross case, but the latter takes its efficacy because it has been interpreted by the law of the Baugh decision. Does the Baugh case sustain that view of the fellow-servant doctrine held by the majority of courts which base the fellow-servant relation upon the *character* of the negligent act rather than upon that of the grade or department of work? We think it does. It must first be noticed that this case decides that the question involved is one of *general law* and not of *local law*. This is a very significant fact, for the reason that the case was first tried in the Federal court of Ohio and was decided in accordance with the decisions of that State. If, now, the question had been determined to have been one of *local* law, then those decisions would have been binding upon the Supreme Court, and there could have been no escape excepting upon the theory that the question was one

of general law. Justice Field, who wrote the decision in the Ross case, dissented in this the Baugh case and insisted that the question was peculiarly one of local law. In the Ross case we find that Justice Field quoted, to sustain his position upon the main question, the cases of Little Miami Railroad Co. *v.* Stevens, 20 Ohio, 415; Railroad Co. *v.* Keary, 3 Ohio St., 201, and Louisville & Nashville Railroad Co. *v.* Collins, 2 Duvall, 44, Kentucky cases, authorities all which sustain the doctrine which takes the minority view of the fellow-servant doctrine. It is therefore significant of the *direction* in which the Baugh case was to be decided that the court at once cleared itself of the impediment of the Ohio cases. The facts in the Baugh case were these: The plaintiff Baugh was employed by the railroad company as foreman on one of its locomotives; the locomotive was manned by one Hite, as engineer, and the engine was known as a "helper"—that is, it aided other engines in haul-
179 ing trains up steep grades, when through its help it returned to its starting point alone under direction of the train-despatcher or following some scheduled train. On the day of the accident the "helper," without special orders and not following any scheduled train, started back and collided with a regular train, and Baugh was injured. Baugh had worked for the company for six months, knew the helper had to keep out of the way of trains, and was familiar with the method of flagging back. The court instructed the jury as follows: "If the injury results from negligence or carelessness on the part of one so placed in authority over the employé of the company who is injured as to direct and control that employé, then the company is liable." This instruction is very similar to the one in the Ross case, but is not so broad as the one given by the lower court in this case. The court, by Justice Brewer, say in formulating the results of the Ross case: "The court, therefore, did not hold that it was universally true that when one servant has control over another they cease to be fellow-servants within the rule of the master's exemption from liability, but did hold that an instruction couched in such general language was not erroneous when applied to the case of a conductor having *exclusive* control of a train in relation to other employés of the company acting under him on the same train. The conductor was, in the language of the opinion, 'clothed with the control and management of a distinct department.' * * * It was this proposition which the court applied in the Ross case, holding that the conductor of a train has the control and management of a distinct department. *But this rule can only be fairly applied when the different branches or departments of service are in and of themselves separate and distinct.*" The court further say that the various employés of large corporations "are not graded like steps in a staircase, those on each step being as to those on the step below in the relation of masters and not of fellow-servants, and only those on the same steps fellow-
180 servants, because not subject to any control by one over the other. *Prima facie* all who enter into the employ of a single master are engaged in a common service and are fellow-servants, and some other line of demarcation than that of control

must exist to destroy the relation of fellow-servant." But the court goes further: "Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and thus assumed by the employé, it includes all coworkers to the same end, *whether in control or not.*" The court then lays down what it considers the proper test in such a case as the one before them, and which in principle is the same as the one we are considering. It is "rightfully this, there must be some personal wrong on the part of the master, some breach of positive duty on his part."

Justice Brewer proceeds then to show the reasonableness of this test, and, continuing, says: "Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employés to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefore." And, finally, the learned justice thus states the present position of the court: "It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow-servants and puts an end to the master's liability. On the contrary, all cases proceed on the ground of some breach of positive duty resting upon the master or upon the idea of superintendence or control of a department. It has ever been affirmed that the employé assumes the ordinary risks incident to the service, and, as we have seen, it is as obvious that there is risk from the negligence of one in immediate control as from one simply a coworker." We have thus quoted extensively from this case because we have thought that that case places the rule in its proper light more cogently than we could possibly have done. Now, bringing the facts of the case which we are passing on to the test of the principles laid down in this Baugh case, and it is too clear for controversy that the relation existing between the foreman of the gang of sectionmen and the plaintiff below was one simply of fellow-servant. True he had a certain control over the servant, but it was not absolute in its character, nor was it such that he had to perform toward the servant any personal duty of the master. When the master had seen that the servant had proper appliances with which to work; when he had used proper care to select suitable coworkers with the servant; when he had furnished the servant with proper rules to guide his conduct, the master had performed his personal duties to the servant. He was under no legal or moral obligation to furnish some one upon the hand car to keep a lookout for approaching trains. As the plaintiff below was injured by the negligence of a fellow-servant, it was the duty of the court to have given the instruction requested by the plaintiff in error. Having refused so to do, it committed error, for which the judgment will have to be reversed and the case remanded for a new trial.

EDWARD P. SEEDS, *A. J.*

181 As we are governed by the decisions of the Supreme Court of the United States, and as we think the conclusions reached by Justice Seeds are amply supported by the authorities cited, we concur. We are constrained to say, however, that the conclusion reached by a majority of the court in the Baugh case, 149 U. S., 368, does not commend itself to our judgment as either a sound or humane construction of the law governing the liability of the master for the negligence of servants placed in *control* of other servants.

A. A. FREEMAN, *A. J.*
ALBERT B. FALL, *A. J.*

I dissent:

The conclusion reached by the court rests upon the theory that the man operating the hand car and those operating the work-train were fellow-servants and that their common master is not liable, under the evidence in this case, for the consequences of an injury inflicted by one upon the other.

Even if conceded that they were fellow-servants, I am of opinion that if the work-train doing the damage left the depot at an improper time, by direction of or in obedience to rules of the common master, and that the injury to the plaintiff resulted therefrom without any fault on his part, the common master is legally liable for the damages. It appears to me that these matters were properly submitted to and determined by the jury in favor of the plaintiff.

If the broad doctrine enunciated in the opinion of the court is to prevail, the wisdom embodied in the maxim "*Respondeat superior*" might as well be eliminated from our jurisprudence.

My conviction is that there is no substantial error in the record, and that the judgment below should be affirmed.

JAMES O'BRIEN,
Chief Justice.

182 UNITED STATES OF AMERICA, }
Territory of New Mexico. }

I, H. S. Clancy, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of the record of proceedings had, judgment given, and opinion filed in the cause herein mentioned, as the same now appears remaining in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the Territory of New Mexico, at Santa Fé, New Mexico, this 31st day of August, 1894.

[Seal Supreme Court, Territory of New Mexico.]

H. S. CLANCY, *Clerk.*

183 The President of the United States to the honorable the judges of the supreme court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before

you, between Atchison, Topeka and Santa Fé Railroad Company, plaintiff in error, and Joaquin Martin, defendant in error, a manifest error hath happened, as it is said, to the great damage of the said defendant in error, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from the date hereof, in the said Supreme Court that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of July, A. D. 1894.

[Seal Supreme Court, Territory of New Mexico.]

H. S. CLANCY,
Clerk Supreme Court of New Mexico.

I hereby make return to the foregoing writ by annexing thereto an authenticated transcript of the record, citation to adverse party, and the opinion filed in said cause, under my hand and the seal of said supreme court.

[Seal Supreme Court, Territory of New Mexico.]

H. S. CLANCY,
Clerk Supreme Court of New Mexico.

184 The United States of America to Atchison, Topeka and Santa Fé Railroad Company, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, holden at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein Joaquin Martin is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to all parties in that behalf.

Witness the Honorable Thomas Smith, chief justice of the supreme court of the Territory of New Mexico, this 30th day of July, 1894.

THOMAS SMITH,
Chief Justice of the Supreme Court of the Territory of New Mexico.

We hereby acknowledge service of copy of above citation this 14th day of August, A. D. 1894.

W. B. CHILDERS,
R. E. TWITCHELL,
H. L. WALDO,
Attorneys for Defendants in Error.

185 In the Supreme Court of the United States, at the October Term, A. D. 1894.

JOAQUIN MARTIN, Plaintiff in Error,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, Defendant in Error.

Comes now the plaintiff in error, by his attorney, and shows to the court here that in the rulings and decisions of the supreme court of the Territory of New Mexico, in a case wherein The Atchison, Topeka & Santa Fe Railroad Company was plaintiff in error, there is manifest error, to the prejudice of the said Joaquin Martin, who is plaintiff in error, in this court, in this, to wit:

1st. The said supreme court of the Territory of New Mexico erred in reversing the judgments and decision of the district court of the second judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo.

2d. The said supreme court erred in holding that the district court should have instructed the jury, as requested by the defendant in error, as follows: "The jury are instructed that although they may believe from the undisputed facts in this case that the injury which the plaintiff suffered was caused by the negligence of the foreman of the hand car, or by that of the persons in charge of the work-train which struck the hand car, or by both, nevertheless all of these persons were fellow-servants of the plaintiff, for whose negligence the defendant is not responsible, and you should find the defendant not guilty."

3d. The supreme court of the Territory erred in its ruling that the plaintiff in error was a fellow-servant of the section foreman.

4th. The said court erred in this ruling that the plaintiff in error was a fellow-servant of the conductor or the engineer of the work-train.

186 5th. The said court erred in failing and refusing to affirm the judgment of the district court.

And the plaintiff in error says that the said court in the rulings and decisions aforesaid and in each and every of them erred, to the manifest prejudice of this plaintiff in error, which errors the said plaintiff in error prays may be corrected and the rulings thereon reversed, and that he may be restored to all things which he has lost by reason thereof.

NEILL B. FIELD,
Att'y for Plaintiff in Error.

Endorsed on cover: Case No. 15,686. New Mexico Terr'y supreme court. Term No., 170. Joaquin Martin, plaintiff in error, *vs.* The Atchison, Topeka & Santa Fé Railroad Company. Filed September 21st, 1894.

BRIEF FOR PLAINTIFF IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1896.

Office Supreme Court, U. S.
FEB 1 1897
JAMES H. McKENNEY,
CLERK.

No. 170.

JOAQUIN MARTIN,
Plaintiff in Error,

vs.

THE ATCHISON, TOPEKA AND SANTA FÉ RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

NEILL B. FIELD,
Albuquerque, New Mexico,
Counsel for Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

Statement.

JOAQUIN MARTIN, the plaintiff in error, was employed as a section hand by The Atchison, Topeka and Santa Fe Railroad Company in the year 1889. The agent of the company who employed him was one Smith, who was a section foreman for the company. He had been in the employment of the company for about three months, when on the fifth day of June, 1889, he went as usual to the section house of the defendant company, located near the City of Albuquerque, New Mexico, about two minutes before seven o'clock in the morning, to go to work. Seven o'clock was the usual hour to begin work. He and one Mares worked together under the direction of Smith, the section foreman, and started with Smith on a hand-car on the morning in question to go north along the line of the railroad of the defendant company to go to work. Neither the plaintiff in error nor Mares knew where they were to work that day, nor what work they were to do, except generally that they were to repair the track somewhere north of Albuquerque. Martin and Mares got out the hand-car and put it on the track and with the foreman proceeded up the track to the north for a distance of about three hundred yards, where they stopped and filled a keg or small barrel with water and placed it on the hand-car, and then all three (the foreman and the two section hands) got on the car and started to the place where the day's labor was to be performed.

At the time of starting plaintiff in error took a position on the hand-car, facing the south, but the foreman told him to turn his face the other way and work the hand-car in that position, which he did. While Mares and Martin were filling the keg or barrel with water, Mares said to the foreman, "John, it looks as though the train is moving out the depot;" to which the foreman responded, "This is not train time; let's go to work."

After the hand car was in motion, with the plaintiff in error and Mares both facing north by the positive order and direction of the foreman, Mares looked back and told the foreman that a train was moving, but he replied, "*Go on, it's none of your business about trains*," and when the hand car had traveled about five hundred yards farther, it was overtaken and run down by an *extra* train of the defendant company. The foreman was killed, plaintiff in error was so seriously injured as to render him incapable of labor, and Mares, the other section hand, was slightly injured. This extra train was moved under orders of the train despatcher of the defendant company at the request of the road master, who designated the work to be done by the train in moving material, the place where the train was to work, and who also had general supervision of the section foreman as the immediate superior of the section foreman.

It is undisputed that at the time of the accident the train which ran over the plaintiff in error was being pushed backward toward the north at the rate of from fifteen to eighteen miles per hour, that both the engineer and firemen were so engaged that they were not watching the track, and that there was nobody on the north end of the train to look out for danger on the

track. Indeed, it may be asserted that this train was run in a manner which indicated a reckless disregard of life on the part of the persons charged with the duty of operating it. It is not denied, I believe, that the train men were guilty of the grossest negligence, and it would therefore seem to be unnecessary to encumber this statement with further details about the manner of operating the freight train.

In order to facilitate the determination of the questions sought to be presented it would seem to be desirable to quote from the testimony of the plaintiff in error and of Mares to show the circumstances under which this accident happened. Plaintiff in error testified as follows :

" Q. What were your duties, what were the duties of Mares, and from whom did you receive your orders? A. From the section foreman.

" Q. What did you do ; what were your duties as section hand there? A. My duties were to do what my foreman told me to do."

Tran., fol. 39.

* * * * * *

" Q. At the time this object arose you were proceeding to state something about a conversation with the section foreman ; go on now and state it. A. I think we were just at the house where we filled the barrel with water and we put the barrel of water on the handcar and we went further north and we got on the handcar. I and my associate stood in front, and as I turned my head south—as I was about to—the foreman told me to turn my head north—my face, and we went north. When we had traveled about 50 yards—

" Q. You have not stated what you were about to state with reference to the conversation with the section foreman when you were interrupted? A. I do not understand what you mean to say by that.

" Q. When you were interrupted you stated that when you were about to put a barrel of water on the hand car Donaciano said something to the section foreman, but you did not state what it was ; now tell it?

A. When we put the barrel of water on top Donaciano told the foreman, 'Mr. Jones, it seems as though they are moving a train at the depot,' and the foreman told him, 'This is not train time; let us go to work.' We got on and I got on in front and I was facing south and he made me turn my face north, and we traveled north. When we had traveled about five hundred yards from the place where we filled the barrel full of water the train overtook us. It struck the train where we were and turned it over on us. I fell at the end of the flat of the hand car in front; I fell on top of the flat; it raised me with the hand car and on to the flat."

Trans., fol. 45.

* * * * * *

"Q. What knowledge or information had you about the approach of that train prior to the time it struck the hand-car? A. I had not any knowledge of it.

* * * * * *

"Q. Did you or not see the train before it struck you? A. No, sir; I did not see it until it struck us."

Tran., fol. 47.

Cross-examined, he said:

"Q. But as a matter of fact, didn't you, if there were two of you in the hand-car—didn't you stand on one side and the other man on the other side, facing each other? A. We used to manage it just according to the orders of the section foreman.

"Q. I am asking you whether you did it according to whether it was not the fact that for all the time before this, generally—

"Q. Is it not a fact that generally you stood as I have asked you when you were working this car; one of you facing in one direction and the other facing in the opposite direction? A. I am answering you that we managed it just according to the orders of the foreman; when he used to order us to have our faces that way, we used to have them that way, and when he ordered us to face each other we would have to have them that way.

"Q. How often did he tell you to stand with your faces in one direction? A. Whenever he pleased. He was the boss.

" Q. How often did he please? A. That morning he told us."

Trans., fol. 55.

* * * * * *

" Q. Is not a fact that you always had instructions to look out for trains? A. They may have told the foreman; they never told us."

Trans., fol. 60.

* * * * * *

" Q. Did the foreman himself never tell you while you were in the employ of the company that it was your duty to keep a watch out for trains when you were on the track? A. No, sir; he never told us.

" Q. Your foreman never told you that nor anything like it? A. No, sir; he never told us anything similar to that.

" Q. You understood it was the duty of the section foreman alone to look out for trains, and you had nothing to do with that? A. I understand that he watched the trains; he knew the hours the trains came in and out.

" Q. Was it not necessary, in order to insure the safety of yourself and others with you on that handcar, when you were running on the track with it, to keep a constant watch for trains? A. I took only care of what the foreman told me.

" Q. Were you not instructed to look out for trains all the time when you were at work on the road? A. When I was working on the track, naturally I used to take care of myself.

" Q. Didn't you know, as a matter of fact, that it was absolutely necessary for your safety to look out for trains at all times? A. *If I had been instructed about that, I would have taken care of myself, and this would not have happened.*

" Q. I am not asking you whether you were so instructed; I am asking you now whether you did not know it without any instructions?

" Q. I am asking you if you did not know as a matter of fact, without any specific instructions, that it was necessary to look out for trains in order to insure your safety? A. I was not instructed about that; I know nothing.

" Q. You say you did not know it was necessary to look out for trains to insure your safety? A. When I saw them coming, why, of course, I took care of myself.

" Q. And you could not take care of yourself unless you did look out? A. That morning I was commanded by the foreman to go on with the hand car.

" Q. That is not a response to the question. Please answer the question. A. I could not; how could I watch?

" Q. Do you mean you could not watch? A. When we were running, I could not watch."

Trans., fols. 61-63.

* * * * * *

" Q. Was the train moving fast or slowly? A. I did not hear it myself.

" Q. You never knew anything about the approach of the train until the hand car was struck? A. Yes, sir; till we were run over.

" Q. Was the hand car making any noise? A. Much."

Tran., fol. 65.

On re-direct examination he said:

" Q. Now, when the hand-car is in motion, is it customary for each individual on that hand-car to attempt to watch the track both ways to see that no trains are moving, or is it the business of the foreman to know about the trains and to look out for them when the hand-car is in motion? A. I understand it to be so.

" Q. You understand what? A. That the foreman must look out for trains while we worked the hand-car."

Being questioned as to his understanding of the powers of the section foreman and his duty to obey him, he testified:

" Q. State what understanding you had, if any, with reference to the power of the section foreman to employ and discharge section hands? A. That he was the foreman of the company, so that the men would do what he commanded them.

" Q. What understanding had you as to his powers over the men? A. That he had the power to order

them and also to discharge the ones that would not obey him."

Trans., fol. 71.

Donaciano Mares, the other section hand, testified as follows:

"Q. Well, state what occurred that day from the time you went to work until the time of the accident? A. I only remember that I was going to turn my face backwards, and he told me not to turn it; that I had no business to do it, and that it was not my business to watch for trains, and that he would take care of that."

Trans., fol. 93.

On cross-examination he said:

"A. There was nothing to impede the sight of the country, except that the foreman told us to turn our faces that way.

"Q. I understand that. What I want to get at is, how far you could see up and down from north to south? A. We could see three or four miles, more or less.

"Q. Either way? A. Yes, sir.

"Q. And had you looked, you could have seen this train that distance? A. Yes, sir.

"Q. And the only reason you did not look, you say, is because the foreman told you to look the other way? A. Yes, sir.

"Q. Did you not look back at any time from the time you started? A. I did look back once, and I told them that a train was moving, but he said to go on, it is none of your business about trains.

* * * * * *

"Q. And you did not know anything about this train until it struck you? A. No, sir; I knew nothing.

"Q. You could not hear it? A. I could not hear it on account of the noise of the hand car."

Trans., fols. 97 and 98.

No part of this evidence was attempted to be disputed, and I think it shows that the plaintiff in error understood it to be his duty, when going to his place

of labor on the hand car, to act under the direction of the foreman as to the position which he should occupy on the hand car, and that, on this particular morning, he was, by reason of the orders of his foreman, so situated as to be unable to look out for himself, and at the same time work the hand car in accordance with the direction of the foreman.

The amended declaration in the case counts especially on this, as constituting one of the plaintiff's causes of action. It is alleged in the second count of the amended declaration : * * *

" And for that the said plaintiff was by the said defendant employed as section hand under the direction of an agent and servant of the said defendant, known as and called a section foreman, which said section foreman of the said defendant the said plaintiff alleges was not a fellow servant of said plaintiff in the same common employment, and the plaintiff alleges that it then and there became and was the duty of the said section foreman of the said defendant to direct the movements of the said plaintiff upon and along the lines of the said defendant in and upon a hand car of the said defendant as aforesaid, when the said plaintiff was going to and from the places along the line of said defendant's railroad track designated by said section foreman as his place of labor in his capacity of section hand as aforesaid by and under the direction of the said section foreman as aforesaid, and it then and there became and was the duty of the said defendant, by and through its said section foreman, to use all proper and due care to protect the said plaintiff from danger arising through the operation of locomotive engines and trains of cars propelled by steam power along the line of said defendant's railroad ; but plaintiff alleges said defendant did not, by and through its said section foreman, use proper or any care to protect the plaintiff from the danger arising through the operation of locomotive engines and trains of cars propelled by steam power, along the line of said defendant's railroad ; but, on the contrary thereof, *the said defendant, through its agent, the said section foreman, did order, command and direct the said plaintiff to go in and upon a hand car of the said de-*

fendant along the line of the said defendant's railroad at a time and place when and where it was hazardous and dangerous so to do, by reason of the fact that the agents and servants of said defendant were then and there about to pass along the said railroad track with locomotive engines and trains of cars then and there propelled by steam power, which said hazard and danger was and ought to have been known to the said section foreman and to the other agents and servants of the said defendant engaged in the operation and running of its said trains of cars and locomotive engines propelled by steam power, and was unknown to this plaintiff, and the plaintiff alleges that the said defendant, through its said section foreman, disregarding its said duty in the premises to use proper and due care to protect the said plaintiff from injury as hereinbefore alleged, did order the said plaintiff to go in and upon a car of the said defendant, called a hand-car, to a place on the line of the said defendant's railroad track designated by the said section foreman, for the purpose of working in his capacity of a section hand, and while the said plaintiff was so going in and upon the said hand-car as aforesaid under the direction of the said section foreman so negligently given as aforesaid, and while the said plaintiff was using all due and proper care, the said hand-car was struck with great violence by a train of cars and locomotive engine, propelled by steam power, belonging to and operated by the said defendant, through its servants and agents, which was passing along the line of the railroad of the said defendant, whereby," etc.

Trans., pp. 8 and 9.

At the trial the Court, as I insist, submitted the facts of the case to the jury under instructions which fairly state the law applicable to these facts; but, if the instructions as given were erroneous, the defendant in error is not in position, and was not in position in the Supreme Court of New Mexico, to avail himself of any such errors. In the first place, the bill of exceptions does not state that it contains all of the instructions given to the jury. It affirmatively appears from the bill of exceptions that no objection was made to the

charge of the Court, no exception was taken thereto until after the jury had retired, and the exception then taken was in general language. It may be well to quote here from the bill of exceptions in order to make this entirely clear. After setting out the charge the bill of exceptions proceeds:

"The jury retire.

"MR. CHILDERS: We except to the charge of the Court and his refusal to give instructions asked by defendant.

"THE COURT: Counsel on either side may have their exceptions noted and file them hereafter.

"To the giving of each and all of which said instructions the defendant by its counsel then and there excepted.

"And the defendant by its counsel *then and there* asked the Court to give to the jury the following instructions, to wit:

"The jury are instructed that, although they may believe from the undisputed facts in this case that the injury which the plaintiff suffered was caused by the negligence of the foreman of the hand-car, or by that of the persons in charge of the work train which struck the hand-car, or by both, nevertheless, all of these persons were fellow-servants of the plaintiff, for whose negligence the defendant is not responsible, and you should find the defendant not guilty.

"But the Court refused to give these instructions to the jury, to which decision of the Court in refusing the same, and each of them, the defendant, by its counsel, then and there excepted.

"And the plaintiff, by counsel, *then and there* asked the Court to instruct the jury *further*, as follows:

"If the jury believe the evidence they should find the issue for the plaintiff and assess his damages at such sum, not exceeding the sum of ten thousand dollars, the amount claimed in the declaration, as from the evidence they shall believe will compensate him for the injuries sustained by reason of being struck by the railroad train of the defendant.

"The Court instructs the jury that it is negligence *per se* on the part of the agents and servants of a railroad company to run a train of cars and locomotive engine propelled by steam power backward at the rate

from sixteen to eighteen miles an hour, without at all times, while the train is so running, maintaining means of immediate and prompt communication to the engineman of the knowledge of the existence of danger or obstruction on the track.

"The Court instructs the jury that the defendant company's trainmen in charge of its train of cars and locomotive engines propelled by steam power were not fellow-servants of the plaintiff engaged in the same common employment, but, on the contrary thereof, the negligence of such trainmen or any of them, if proved in this case, is attributable to the defendant company.

"The Court instructs the jury that the defendant company's section foreman was not a fellow-servant of the plaintiff engaged in the same common employment, but, on the contrary thereof, the negligence of such section foreman, if proved in this case, is attributable to the defendant company.

"But the Court refused to give these instructions to the jury, to which decision of the Court, in refusing to give the same and each of them, the plaintiff, by his counsel, then and there excepted and still excepts."

The verdict in this case, which was rendered on the 3d day of December, 1892, was in favor of the plaintiff. The bill of exceptions was filed on the 27th day May, 1893, and opened with this statement:

"Be it remembered, that on the trial of this case, the following proceedings were had, and the plaintiff gave in evidence the testimony of witnesses and objections were made and acted upon by the Court, and exceptions filed as hereinafter follows, *i. e.*"

Now, whatever may be said about the use of the words "then and there" in this bill of exceptions, there is certainly nothing in the bill from which the Court can conclude that the defendant excepted to the charge of the Court while the jury was yet at the bar, or that the defendant asked any instructions to the jury before the argument commenced, as required by the statute of New Mexico.

The Supreme Court of the Territory in its opinion (found at page 102 *et seq.* of this record) states this case substantially as in the foregoing statements and treats the facts as undisputed. That Court refused to pass upon the question as to whether the bill of exceptions properly presented for review the charge of the trial Court, and reversed the case upon the ground that the Court erred in refusing an instruction asked by the defendant.

The instruction refused was in the following language :

"The jury are instructed that, although they may believe from the undisputed facts in this case that the injury which the plaintiff suffered was caused by the negligence of the foreman of the hand car, or by that of the persons in charge of the work train which struck the hand car, or by both ; nevertheless, all these persons were fellow servants of the plaintiff, for whose negligence the defendant is not responsible, and you should find the defendant not guilty."

The Court charged the jury, among other things, as follows :

" If you find from the evidence that the plaintiff was employed by the defendant, through the instrumentality of its section foreman, to labor in the capacity of a section hand upon the line of the defendant railroad, and that the plaintiff, in a compliance with the command of the said section foreman, entered upon and into a hand-car of the defendant on the morning of the 5th of June, 1889, for the purpose of going to his daily labor, and that, while the plaintiff was so going in and upon the said hand-car, a train of cars and locomotive engine, propelled by steam power, operated by the agents and servants of the defendant, was run upon and over said hand-car, through the negligence or recklessness of the agents or servants of the defendant in charge of said train of said train of cars and locomotive engines, and the plaintiff was thereby injured, and that the plaintiff, at the time of receiving the said injury, was exercising due care and caution to protect

himself from injury, the jury should find the issues for the plaintiff, and assess his damages at such sum as will compensate him for the injuries received, not exceeding the sum of ten thousand dollars, the amount of damages claimed in the declaration.

* * * * * *

"If the jury believe from the evidence that the plaintiff was employed by the defendant company, through its section foreman, to labor as a section hand on its track, and that, by the terms of his employment, the plaintiff was subject to the orders of said section foreman, as to the time when and the place where he should labor, and if the defendant company provided a hand car upon which to transport the plaintiff and the witness Mares and the said section foreman to their daily labor, and if the said section foreman negligently ordered the plaintiff and the witness Mares to go with him upon the said hand car on the 5th day of June, 1889, for the purpose of performing labor for the defendant company at a time and place when and where it was dangerous to go by reason of the fact that other agents and servants of the defendant company were then and there about to pass on and along the said tracks of the defendant company with a train of cars and locomotive engine propelled by steam power, and if the said section foreman knew or by the exercise of ordinary care might have known of said danger, and if the said danger was unknown to the plaintiff, and the said section foreman assured the plaintiff and the witness Mares that he, the said section foreman, would warn them of any danger that might arise from the passing of trains, the plaintiff had the right to rely on such assurance so given, and if, by reason of the failure or neglect of the section foreman to apprise himself of the approach of the defendant's train of cars and to warn the plaintiff of its approach, the plaintiff was run over and injured by the said train of cars of the defendant company, they should find the issues for the plaintiff, notwithstanding they may believe from the evidence that the plaintiff might, but for said assurance of the section foreman, have protected himself from the danger by the use of ordinary care, provided the jury shall believe from the evidence that the plaintiff relied on the assurance of said section foreman, and by reason

thereof failed to guard himself against danger arising from the approach of trains from the rear."

Trans., pages 91, 92.

It has been suggested in private discussion by counsel for defendant in error, and may be urged by him here, that there is nothing for this Court to review, for the reason that the Supreme Court of New Mexico at first reversed this case and remanded it to the District Court for a new trial, and afterwards so modified its judgment as to enter final judgment against the plaintiff in error, on the motion or at the suggestion of his counsel, and the rule that he who procures a Court to enter judgment in a certain form cannot complain if such action on writ of error is invoked.

It is scarcely to be believed that it is seriously contended that this rule has any application to the present case. The rule is not disputed; it is undoubtedly true that, if the party to a litigation induces a Court to enter judgment in a given way under the belief that the judgment when so entered will be acquiesced in by him, he will be estopped to make such action of the Court ground of error in a court of review, and this upon settled principles of the law of estoppel; but an examination of the record in this case will disclose the fact to be that plaintiff in error asked the Supreme Court in New Mexico to modify its judgment and make it final against him, not upon any theory that he would be satisfied, that he would acquiesce in the judgment which was so entered, but for the purpose, as was distinctly stated, of facilitating a review by this Court of that judgment.

The Supreme Court in its opinion had announced a legal principle which, if correct, was conclusive of the right of plaintiff in error to recover, and he in effect

said to that Court: "I cannot make a different case on another trial, and it will be a waste of time and money to send this case back for another trial in the District Court. Enter final judgment here and let me go without delay to the Supreme Court of the United States and take the opinion of that Court upon this legal question."

Having done so, counsel for defendant in error seeks to apply the doctrine of estoppel and to prevent the very review which the Supreme Court of the Territory was asked to facilitate, and which that Court intended and attempted to facilitate.

It seems to me that we are rather in the position of a party who has had leave to amend after demurrer sustained, and elects to stand on his pleading, and that we are entitled to have reviewed by this Court the action of the Supreme Court of New Mexico, upon the record as it stood in that Court, and if the record shows that that Court erroneously reversed the judgment of the trial Court, this Court should reverse that action and send the case back to the Supreme Court of the Territory with instructions to affirm the judgment of the trial Court.

Plaintiff in error assigns the following errors:

1. The said Supreme Court of the Territory of New Mexico erred in reversing the judgment and decision of the District Court of the Second Judicial District of the Territory of New Mexico, sitting within and for the County of Bernalillo.

2. The said Supreme Court erred in holding that the

District Court should have instructed the jury, as requested by the defendant in error, as follows:

"The jury are instructed that, although they may believe from the undisputed facts in this case that the injury which the plaintiff suffered was caused by the negligence of the foreman of the hand-car, or by that of the person in charge of the work train which struck the hand-car, or by both, nevertheless all these persons were fellow-servants of the plaintiff for whose negligence the defendant is not responsible, and you should find the defendant 'not guilty.'"

3. The Supreme Court of the Territory of New Mexico erred in its ruling that the plaintiff in error was a fellow-servant of the section foreman.

4. The said Court erred in its ruling that the plaintiff in error was a fellow-servant of the conductor or engineer of the work train.

5. The said Court erred in failing and refusing to affirm the judgment of the District Court.

I think it follows from the facts of this case and the errors assigned that this Court is called upon to determine two questions:

FIRST. On account of the defects in bill of exception pointed out in this statement, was there anything to be reviewed by the Supreme Court of New Mexico? and

SECOND. If the questions passed upon by that Court were properly before it, was its action correct?

Thus dividing the questions to be presented, we submit the following points and authorities:

The Supreme Court of the Territory of New Mexico could not properly review any of the questions sought

to be presented and passed upon by it, because of the defects in the bill of exceptions.

I.

Exceptions to the charge of the Court must be taken while the jury is yet at the bar; if not taken until after the jury has retired, they will be disregarded.

In this case the bill of exceptions clearly shows that no exception was taken to the charge to the jury until after the jury had retired, when counsel for defendant in error said: "We except to the charge of the Court and his refusal to give instructions asked by defendant," to which the Court replied: "Counsel on their side may have exceptions noted and file them hereafter." The verdict was rendered December 3d, 1892; the bill of exceptions was filed on the 27th of May, 1893, and between the time of the retiring of the jury and the filing of bill of exceptions no effort was made to specify the exceptions to the charge of the Court. It will be shown hereafter that the specifications of exceptions to the charge of Court in the bill of exceptions is wholly insufficient to present any question for review.

The statute of New Mexico (Section 2797 of the Compiled Laws of 1884) is as follows:

"Exceptions to the decision of the Court upon any matter of law arising during the progress of the cause or to the giving or refusing of instructions must be taken at the time of such decision." * * * This

statute is merely declaratory of the established rule, as will appear from the following authorities:

U. S. vs. Cary, 110 U. S., 51.
St. Louis, etc., Co. vs. Spencer, 71 Fed., 93.
Bracker vs. R. W. Co., 56 Fed., 447.
Southerland vs. Round, 57 Fed., 467.
Park vs. Bushnell, 60 Fed., 583.
Price vs. Parkhurst, 53 Fed., 312.
Garoutte vs. Williamson, 108 Cal., 135.
Phelps vs. Meyer, 15 How., 160.

II.

A general exception to the charge will be overruled if any proposition contained in the entire charge is sound.

It is certainly the settled law of this Court that such an exception presents nothing for review in the appellate tribunal. The proposition has been so often reiterated that it would seem to be no longer a proper subject of discussion. The exception in this case, filed more than four months after the jury returned their verdict, was in the following language:

"To the giving of each and all of which said instructions the defendant, by its counsel, then and there excepted."

A rule of this Court, which is also a rule of the Supreme Court of the Territory of New Mexico, forbids the Trial Court to settle a bill of exceptions containing the entire charge of the Court upon any such general exception as this, but when the rule has been violated

as in this instance this Court has uniformly refused to consider any alleged defects in the charge.

Block vs. Dowling, 140 U. S., 234.
Cooper vs. Schellessinger, 111 U. S., 148.
Burton vs. Ferry Co., 114 U. S., 474.
Meulour vs. Ins. Co., 111 U. S., 335.
Ins. Co. vs. Trust Co., 112 U. S., 250.
Jones vs. Buckell, 104 U. S., 554.
Ins. Co. vs. Snyder, 93 U. S., 393.
Roger vs. The Marshall, 1 Wallace, 644.

III.

Requests for instruction must be submitted to the Trial Judge before the argument is concluded.

This is the positive requirement of the Statute of New Mexico (Section 2055, Compiled Laws of 1884), which is as follows:

"Before the argument is concluded either party may request instructions to the jury on questions of law which shall be given or refused by the Court. * * *" The rule declared by this statute is apparently one of uniform application by the Court and is founded in sound reason. The trial Judge asked to instruct a jury upon propositions of law supposed to be applicable to the facts of the particular case, is certainly entitled to reasonable opportunity to examine and reflect upon propositions upon which he is asked to pass. In this case, not only had the argument closed, but the jury had retired to consider their verdict before the Court's attention was called to these requests to charge, as shown by the bill of exceptions, and in this connection it must be borne in mind that this bill of exceptions was prepared, not by counsel for the plaintiff in error, but by counsel for the defendant in error, and it contains the affirmative statement following the statement that

the jury had retired, that the defendant by its counsel then and there asked the Court to give the jury the instructions."

This rule was applied by Judge STORY in a capital case.

Turner vs. Foxhall, 2 Cranch, C. C., 324.
Forest vs. Hanson, 1 Id., 63.
U. S. vs. White, 5 Id., 116.
U. S. vs. Gilbert, 2 Sumner, 94.
Ela vs. Cockshott, 119 Mass., 416.
McMahon vs. O'Connor, 137 Mass., 216.
Allen vs. Shaw, 27 Ind., 388.
Hege vs. Newson, 96 Ind., 429.
Life Ins. Co. vs. Frances, 672.

IV.

Unless it affirmatively appears that requests to charge were submitted in due time, the presumption is that, if correct, they were refused because not presented in time.

This also I think is a rule of invariable application which grows out of the rule that the Court will never presume error, but will always presume the contrary unless error be affirmatively shown by the person complaining of the action of the Trial Court. If necessary, to support the refusal of the instructions complained of, this Court will presume that a proper charge covering the same point was given by the Court and that the refusal was upon that ground. The bill of exception does not show affirmatively that it contains the

entire charge of the Court. It has been well said by the Supreme Court of Indiana that

"one complaining of a ruling must, in order to secure a refusal, affirmatively show that he placed himself in an attitude to rightfully ask that which the Court refused him. If this be not done, the presumption of regularity which always attends the proceedings of the Trial Court in the absence of a trial will require the Appellate Court to assume that the party did not do that which the law required him to do in order to entitle him to the ruling asked."

Puett vs. Beard, 86 Ind., 104.
2 Thomson on Trials, Sec. 2364.
Elliott App. Pro., Sec. 722, and cases cited in Note 1.

SECOND.

If the foregoing propositions are sound and applicable to this case it will necessarily follow that the action of the Supreme Court in reversing the judgment of the trial Court was wrong without regard to the merits of the controversy. I insist, however, that this record, taken as a whole, shows that the action of the trial Court was right, and that of the Supreme Court of New Mexico erroneous, even if all of the questions sought to be passed upon by that Court were properly before it for decision.

I.

The foreman of the section while giving directions to his subordinates as to the particular manner in which they should oper-

ate the hand-car stood in the place of the master.

This proposition, of course, involves the entire merits of the controversy, the construction of the previous adjudications of this and other courts upon this much-vexed question, and the application of these adjudications to the peculiar facts of this case.

In the opinion of the Supreme Court of the Territory it is assumed by a majority of the Court that the decision of this Court in the case of the B. & O. Railroad Co. vs. Baugh (149 U. S., 368) is conclusive of the legal proposition involved here, and it will be noticed that two of the Justices concur in the reversal of the case upon the distinct ground that they are bound by the Baugh case, and have even gone so far as to record a dissent from the principles announced in that case as they understood them. I refer to this merely for the purpose of directing the attention of this Court to the state of mind of the Supreme Court of the Territory when passing upon the case, for the purpose of enabling this Court to interpret the opinion as that Court understood it should be interpreted.

Since the decision of the Baugh case the cases of Hambly, Peterson and Charless have been supposed to fully support the decision of the Supreme Court of the Territory in this case, but I insist that no one of these cases decides any principle of law which is conclusive against the right of the plaintiff in error to recover here, and that, unless the Ross case decides the question involved in favor of my contention, this is the first time that this Court has been asked to pass upon the distinct question upon which the rights of the parties to this litigation must turn. I think the question

may be fairly stated thus: If a common master employs two or more servants to accomplish the same general purpose and places one of these servants under the control of another as to the place where he shall do his work, and the servant thus placed in control by the contract of employment directs his fellow to perform work in a place not necessarily dangerous at all times, but which from its nature and the uses to which it is put may become a dangerous place from time to time, assuring the servant so placed that he will warn him of the approach of danger and fails to do so, although the servant so placed without such assurance might have been able to protect himself, but relying on the assurance, is injured, is the master liable? I submit that no decision of this Court upon facts at all analogous has held that the master is not liable, and that every rule of justice and humanity demands that under such circumstances the master shall be held to be liable.

The Baugh case certainly does not rule the point against us, for in that case it is said:

"It may be noticed that in this particular case the injury was not in consequence of the fireman obeying any orders of his superior officer." *It did not result from the mere matter of control.* It was through negligence on the part of the engineer in
and the injury would have been the
had had nothing to do on the locomotive,
been under the engineer's control. When an employee carelessly manages an engine, and another employee who happens to be near enough is injured by such carelessness, it would seem, therefore, to be the ordinary cause of the injury of one employee through the carelessness of another.

It is admitted that the Hambly, Peterson and the Charless cases have set at rest much that before the decision of those cases was the subject of fierce controversy at the bar, and great diversity of opinion

among the Courts, but none of these cases purport to depart from the underlying principle of the Baugh case or to in any manner enlarge that principle. A majority of this Court has said that the Baugh case is not in conflict with the decision in the case of Ross. I think an examination of these five cases will convince the Court that the principle laid down in the Ross case is the one which is applicable to the facts in the case at bar.

Railway Co. vs. Ross, 112 U. S., 377.
B. & O. vs. Baugh, 149 U. S., 368.
North. Pacific R. R. Co. vs. Peterson, 162 U. S., 346.
Same vs. Charless, 162 U. S., 359.
Same vs. Hambly, 154 U. S., 349.

II.

That the master owes to the servant the duty of providing a reasonably safe place in which to do his work is, of course, beyond controversy.

While all the Courts apparently agree upon this statement of the proposition, there seems to be the utmost difficulty and difference of opinion as to what is meant by it. Some courts in applying the equally well-settled rule, that the servant assumes the risk of the ordinary dangers of his employment, including the risk of the negligent performance of their duties by fellow-servants, reduce to very narrow limits the value of the rule which requires the master to furnish a reasonably safe place as a means of protection to the employees. Other Courts, it seems to me, go to the

other extreme and virtually destroy the doctrine of assumption of risk by the servants, under which the master finds his most effectual protection. I submit that the law lies not at the one extreme end or the other, and can be well stated thus: That if the servant, by the act of the master, is led into hidden, unusual or unexpected dangers, and is thereby injured, the master is liable. It is only dangerous to go upon a railroad track upon a hand-car because trains may pass unexpectedly and without notice. If the employee directed to go upon a hand-car is assured that no train shall pass without due notice to him, the danger of injury by the passage of a train without notice is no longer one of the ordinary risks of the employment assumed by the servant.

"It is undoubtedly the duty of a master when his servants are engaged in hazardous employment to see that every reasonable precaution on his part to insure safety is observed." *The prime duty of the servant is obedience*, and it is not to be expected that he will upon mere imaginary danger of which he may be conscious assert his right to relinquish his employment, but naturally looks to his employer for the observance of all reasonable and proper precaution, and his continuance in the service when such precaution has not been observed is rather to be attributed to confidence in those to whose superior judgment he yields. If the risk is such as to be perfectly obvious to the sense of any man, whether servant or master, then the servant assumes the risk; but if it is a case where no such obvious risks are incurred, and where it is fair to presume that the employer had been guilty of no negligence, the rule of law as well as the rule of common sense and justice is that the master is responsible for damage, if any ensue.

Keegan vs. Cavanaugh, 62 Mo., 333.

The master having subjected this servant to the command of another without information or caution with respect to all such obligations as the master owes,

the other stands in the master's place. Nevertheless, the two servants are, as regard the common employment, fellow-servants.

Atlas Engine Works vs. Randall, 100 Ind., 297.

See, also,

Hoffman vs. Dickinson, 31 W. Va., 154.
Criswell vs. Ry. Co., 30 W. Va., 798.
Hickman vs. Mackay, 35 Fed., 353.

III.

Where the master owes a personal duty to a servant, he cannot by the delegation of that duty to one who is for all other purposes a fellow-servant escape liability for its negligent performance.

For the purpose of designating the place where the plaintiff in error was to work that day, and how he should go to work, and how he should operate the hand-car while *en route*, the foreman was clothed by the company with all of the powers possessed by its highest executive officer. The fact that the section foreman, and not the general manager of the company, directed the plaintiff in error to go on the hand-car in question, and turn his face to the north, and promised that he would look out for trains coming from the south, is, in my opinion, wholly immaterial in the case. To him was delegated by the company the power to order the plaintiff in error to do this thing. His promise which accompanied the order, and which was in legal effect the promise of the company, that the plaintiff in error should be warned of the approach of trains from the south in time to avoid injury

to himself, was the promise of the company upon which the plaintiff in error had a right to rely. His failure to keep that promise was the company's failure, and that failure was the direct cause of the plaintiff's injury, for which the company is liable.

"If a person undertakes to do an act or perform a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence."

Sweeney vs. Old Col. R. R. Co., 10 Allen, 368.
Hough vs. Railroad Co., 100 U. S., 213.
B. & O. R. R. Co. vs. Baugh, 149 U. S., 368.

IV.

Plaintiff in error had a right to rely on the assurance of the foreman that he would look out for trains.

As has been said before, the legal effect of this assurance was a promise to warn plaintiff in error of the approach of trains from the rear. I think there is no difference in principle between such a promise and a promise to repair defective machinery, upon which, beyond a doubt, a servant has a right to rely. If it be suggested that it was recklessness on the part of plaintiff in error to rely, as he testifies he did, on this assurance, our reply is that the verdict of the jury in his favor involves a finding by the jury that such reliance by him did not amount to contributory negligence.

Railroad Co. vs. Fort, 17 Wall., 553.
Hough vs. Railroad Co., 100 U. S., 213.
Railroad Co. vs. Mares, 127 U. S., 710.

In conclusion I beg to say that the instruction asked by defendant in error was properly refused because it does not correctly state the law applicable to the case.

The instruction asked was too broad—it in effect asked the Court to find on the undisputed facts that plaintiff could not recover; if the defendant was entitled to have the jury told that the section hands and the trainmen were fellow-servants, or that the section hands and the foreman were fellow-servants, it should have requested the Court to so charge without including the proposition which was involved in the instruction as asked—that because of the existence of such relation the plaintiff could not recover. The Court refused to charge as requested by the plaintiff in error that the section hands and the trainmen were not fellow-servants, and also refused to charge that the foreman and the plaintiff in error were not fellow-servants, which shows that the case, as viewed by the trial Court, did not turn upon the fellow-servant question, but rested upon the failure of the master to perform a duty which he owed to the servant.

I submit that the case should be reversed and remanded to the Territorial Supreme Court, with instructions to affirm the judgment of the trial Court.

Respectfully submitted,

NEILL B. FIELD,

Counsel for Plaintiff in Error.

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Office Supreme Court, U. S.
FILED.
FEB 17 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

No. 170.

JOAQUIN MARTIN,
Plaintiff in Error,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY,
Defendant in Error.

In Error to the Supreme Court of the Territory of New Mexico.

BRIEF FOR DEFENDANT IN ERROR.

E. D. KENNA,
ROBERT DUNLAP,
ATTORNEYS FOR DEFENDANT IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago

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STATEMENT.

It is difficult to understand why there should be a misstatement of a fact not material to the discussion of the questions involved. It is stated (see page 2 of opponent's brief) that there was nobody on the north end of the work train to look out for danger on the track, and there was a reckless disregard for life on the part of the persons operating the train. It is not contended in the argument that defendant is liable upon this ground. We must therefore conclude it was injected to create preju-

dice. While it is true that two witnesses testified that they saw no person on the north end of the train, yet it was a matter they might not have observed, and the foreman of repairs testified that he was upon the north end of the train, and both he and the brakeman, who was upon the steps of the caboose, signaled the engineer. (Trans., pp. 63, 71 and 72.) From the engineer's testimony, it seems he and the fireman were engaged in their work, not looking ahead, and therefore did not see the signals. There was, of course, evidence of the engineer's negligence. When the trial was commenced, however, plaintiff attempted to show negligence in the section foreman upon the hand-car in failing to keep a lookout for the train, and the court, over the objection of the defendant, permitted plaintiff to amend by charging such negligence and refused an application for a continuance. (Trans., pp. 25 and 26.) So the railroad company was forced to try an entirely different issue without any opportunity for preparation. The plaintiff attempted to show that it was the duty of the section foreman to command and that it was his duty to fully obey. This, however, was merely the understanding of the plaintiff. (Page 44.) So, also, was it merely the understanding of plaintiff that the foreman must look out for trains while they were all working the hand-car. (Page 43.) For the purpose of showing his utter subjection, in a parrot-like manner, without being asked he reiterates that the foreman's work was to command them. It clearly appears, however, that plaintiff learned, when they put the barrel of water

on the hand-car, that there was danger of a train moving out of the depot, but the foreman seemed to think it was not train time and was in a hurry to get to work. (Page 27.) It seems he also learned that the foreman did not want to stop, though there was a train moving in front. (Page 32.) He testifies the foreman directed him to turn around, facing north, to work the hand-car, while the foreman also assisted in working it, stating to the two men that he would look out for trains in the rear.

Donaciano Mares, plaintiff's fellow workman, and his witness, testified that he often told plaintiff it was necessary for them to take care of themselves in looking out for trains on account of the danger of the position. (Page 60.)

If there was any negligence in the section foreman in failing to watch for trains in the rear, or discover the same in time, it resulted disastrously to him. His lips are sealed in death, and his two companions now seek to place the blame for the injury upon him.

The section foreman, however, had only these two men under him and worked with them in repairing the section. It was necessary to use the hand-car in furtherance of this work, and they were all working together upon the hand-car. The section foreman was under the roadmaster, and the roadmaster was under the division superintendent. The evidence showed that the section foreman was not a superintendent or the head of any department. The evidence further showed that trains were operated under telegraphic orders.

These orders, of course, were only given to trains liable to meet upon the same track. Those who used the hand-cars had to look out for themselves. These hand-cars could be removed from the track at any time by two persons. (Rec., 59.) So that if care was used by the men in operating the same there would be no danger. Hand-cars are never operated under telegraphic orders, and could not, in the nature of things, be, as they work frequently between stations.

It further appeared that plaintiff knew trains were liable to pass at any time. The defendant had made elaborate rules for the guidance of its men, including the running of trains and protection of workmen. (Rec., 86–88.) One of these rules provided: "Every man at work on the track must bear in mind that in operating the road under telegraph orders a train may pass at any moment." (Trans., 86.)

After the evidence was in, the defendant moved the court to instruct the jury to return a verdict in its favor. (Trans., 89.) This motion was overruled (page 90), and the court instructed the jury that if they found the trainmen were negligent and their negligence was the cause of the accident, their verdict should be for the plaintiff; also, that it was the duty of the trainmen, when backing the train, to have a person at the forward end to give warning of danger, also, if the section foreman was negligent in failing to learn of the approach of the train so as to give warning to the plaintiff, and the plaintiff was thereby injured, the jury should find for the plaintiff, and the jury did find for the plaintiff.

The railroad company made sixteen assignments of error in the Supreme Court of the territory. (Pages 96-99.) That court reversed the judgment of the District Court and remanded the case for a new trial. (Page 100.) Afterwards, the plaintiff, or defendant in error, by his attorney, of his own volition, asked the Supreme Court to render a final judgment against him, and the Supreme Court complacently altered and set aside its previous judgment at the request of Mr. Field, and directed that the judgment of the District Court of Bernalillo County be reversed, and that plaintiff in error do have and recover of defendant in error its cost in the Supreme Court as well as in the court below. (Page 101.)

ARGUMENT.

THERE IS PRACTICALLY NOTHING FOR THIS COURT TO CONSIDER.

It is difficult to understand of what plaintiff in error in this court can now complain. Of course, this court would have had no jurisdiction over the judgment of the Supreme Court of the territory reversing and remanding the case for new trial, as that was not a final judgment.

Shute v. *Keyser*, 149 U. S., 650.

Under that judgment, the railroad company was entitled to a new trial in the District Court, and while plaintiff might not have made a better case upon another trial the defendant might. It was entitled to go to the jury under different instructions. The jury might not find that there was any negligence in the dead section foreman. The plaintiff could not defeat the right of the defendant by voluntarily consenting to or requesting a final judgment against him in the Supreme Court, so as to collusively confer jurisdiction upon this court, and by so doing deprive the defendant of the right of being heard and of having the Supreme Court of the territory determine all the errors assigned.

A judgment rendered against a party at his own solicitation cannot be said to involve judicial action in the court. It is simply a record of the wish of the party the same as a judgment entered in pursuance of an agreement. It does not therefore afford a proper subject for review in another court.

It would seem from the assignments of error in this court that plaintiff in error assumes the *opinion* of the territorial court to be the *judgment* which this court is called upon to review. The reasons which may actuate a court in coming to a conclusion do not constitute the judgment. The judgment which this court is now called upon to review is simply one reversing the judgment of the District Court of the territory, and, to say the least, if that judgment were now the subject of review the burden would be upon plaintiff in error to show that upon no possible ground was the judgment of reversal proper.

The second, third and fourth assignments of error seem to be based wholly upon matter contained in the opinion of the Supreme Court, but how has the plaintiff based any exception to these matters so as to make them the subject of review in this court? Properly speaking, the opinion is not a part of the record.

The fifth assignment has nothing to stand upon.

The first assignment predicates error in the Supreme Court of the territory in reversing the judgment of the District Court,but how is this court expected to review that matter?

Paragraph 2,190,Compiled Laws of New Mexico, 1884, provides:

"The Supreme Court, in appeals or writs of error shall examine the record, and on the facts herein contained alone shall award a new trial, reverse or affirm the judgment of the District Court, or give such other judgment as to them shall seem agreeable to law."

Its power over the judgment or proceedings in the lower court is not as limited as that of this court. Now, since the Supreme Court, at the request of the plaintiff, did not remand the case for a new trial on account of errors committed which might be corrected on a new trial, but rendered simply a judgment of straight reversal, we must at least assume that in doing so the Supreme Court reviewed all the evidence in the case and found that the plaintiff was not entitled in its judgment to recover; but how is this court expected to review such action? There are no finding of facts, no exception to any rulings, taken by plaintiff in error.

The jurisdiction of this court on writs of error or appeals is defined and limited by the act of April 7, 1874, chapter 80.

See,

Hecht v. *Boughton*, 105 U. S., 235.

The opinion of the Supreme Court cannot be looked to. It simply affords some reasons for the reversal, but there may be others. The party in whose favor the judgment is, is not limited to these reasons to uphold the judgment.

Plaintiff in error has attempted to have a review in this court in a manner not recognized by the law. He cannot consent to the judgment and then complain in this court of that very judgment, which is the only one, viz: a final one, which would confer jurisdiction upon this court to hear parties aggrieved. The maxim, *Volenti non fit injuria*, is one of general application and would seem to cover

this case. To hold otherwise would deprive the defendant in error in this court of a new trial granted by the Supreme Court of the territory; of the right to have that court determine that the District Court abused its discretion in refusing the defendant a continuance and forcing it to try an entirely different issue not presented by the pleadings. This although this court might not have the same power of review. No affidavit for continuance on account of absence of witnesses or testimony was required in such case, for it could not be made because the defendant had no opportunity to investigate and prepare for trial upon an entirely new issue.

Defendant in error had a right to have the Supreme Court of the territory pass upon and decide the grounds set up in its motion for a new trial. (Sec. 1842, Comp. Laws New Mexico, 1884.) It had a right to have the Supreme Court of the territory first determine local questions of practice and the construction or meaning of its rules with reference to exceptions to instructions.

It has the power to make such rules. See Comp. Laws New Mexico (1884), Secs. 2199, 1833 and 521.

It is the best judge to interpret them and determine whether they have been complied with.

It is also believed that the judgment of mere reversal and for costs in this case is not a final judgment, subject to review.

Scott v. *Burton*, 55 Am. Dec., 782.

SECTION FOREMAN WAS A FELLOW SERVANT WITH PLAINTIFF. FOR HIS NEGLIGENCE IN FAILING TO KEEP A LOOKOUT OR TO PROTECT AGAINST NEGLIGENCE OF OTHERS, IF ANY, THE DEFENDANT IS NOT LIABLE.

The question is directly raised under the evidence in favor of defendant by its motion at the conclusion of the evidence to direct a verdict in its behalf. This motion is not to be treated as a request for instruction upon a proposition of law, and need not be in writing.

A. T. & S. F. R. R. Co. v. *Meyers*, 76 Fed. Rep., 443; C. C. A., 7th Circuit.

This motion was made before the argument to the jury (Rec., 89), and therefore in ample time.

The careful opinion of Judge Seeds, of the Territorial Supreme Court, clearly foreshadowed what would necessarily be the subsequent decisions of this court based upon the case of *Railroad Company* v. *Baugh*, 149 U. S., 368. We apprehend this court will have no difficulty in understanding that opinion.

Plaintiff in error is simply making a desperate attempt to distinguish the case at bar from the recent rulings of this court made subsequent to the decision of the Supreme Court of the territory. His acumen is akin to that of the celebrated expounder who—

"Could split and divide
"A hair twixt south and south-west side."

There ought to be no serious misapprehension as

to the doctrine of this court as now established. Where it is sought to hold the master liable for the negligence of a superior servant upon the ground of such superiority, it must be shown that the superior servant was the superintendent of or the head of a distinct department, even under the ruling in the *Ross* case, as explained in the *Baugh* case.

In *Northern Pacific R. R. Co.* v. *Peterson*, 162 U. S., 346, the plaintiff, a section hand, was injured through the negligence of the foreman of an extra gang of laborers, by reason of his failure to give warning of an intention to stop the hand-car which he was propelling, and stopping the same too suddenly, thereby causing the following hand-car, upon which the plaintiff was, to collide. The foreman of the gang in that case had thirteen men under his charge who were subject to his orders.

In the following case of *Northern Pacific R. R. Co.* v. *Charless*, 162 U. S., 359, a section laborer was injured by the negligence of a section foreman. The alleged negligence of the foreman in that case was in running the hand-car at too high a rate of speed, thereby rendering it dangerous to those upon it and resulting in a collision with a train.

In *Central R. R. Co.* v. *Keegan*, 160 U. S., 259, it appeared that a force of five men, including plaintiff, was in the night service of the railroad company under the orders of O, who directed them about the work. Plaintiff was injured by reason of something done by a fellow workman under the orders of O, and on account of the alleged neg-

ligence of O in not placing himself at the brake of an uncoupled car which ran over the plaintiff.

In *Kansas & A. V. Ry. Co.* v. *Waters*, 70 Fed. Rep., 28, C. C. A., 8th Circuit, cited with approval in the *Keegan* case, the plaintiff, a section man, while riding upon a hand-car, was injured through the neglect or failure of a section foreman to flag his hand-car for a special train or to look out and guard against such train, It was held, nevertheless, that the railway company was not liable.

In all the foregoing cases the foremen had

Thompson vs. Chicago & E. R. Co., 45 N. E. R., 655; Sup. Ct. Ind.
C. C. C. & St. L. Rly vs. Brown, 73 Fed. Rep., 970; (C. C. A., 7th Cir.).
Balch vs. Haas, 73 Fed., 970; (C. C. A., 8th Cir.).

against the negligence of the trainmen, and that by ordering the plaintiff to turn around and look forward it became all the more his duty to do so, and that in this respect he was discharging a duty which the master owed. The direction of the section foreman to the plaintiff to look the other way would simply tend to excuse the plaintiff of the charge of contributory negligence, but could not enlarge the duty of the master or furnish a ground of negligence in the master. Some one ought to be looking ahead. While it may be asserted that these parties understood the section foreman would keep a watch in the rear for the train, yet in this respect he was not discharging any absolute duty devolving upon the master. He was simply working with the other two men in moving the hand-car. They were all engaged in the same common purpose. It

was all mere matter of detail in carrying on the work of the common employer. It is not the absolute duty of the master to furnish a guard for his men against the negligence of others, or advise them of danger which may result from the acts or negligence of other servants. If the section foreman undertook the duty of watching it was a voluntary act on his part. If there was any omission on his part he himself suffered thereby. It did not in the least change his relation in that respect as being other than a fellow workman with the two men upon the hand-car.

It is, of course, true that it is the absolute duty of the master to use care in employing reasonably competent and careful fellow workmen, also to use reasonable care in furnishing the workmen with reasonably safe appliances, tools or instrumentalities with which to work, and out of the latter is evolved the duty, not always clearly defined or understood, of furnishing the workmen a reasonably safe place at which to work. In the case at bar, the appliances were safe. There was no negligence in the employment of fellow workmen. The roadbed and hand-car were safe. When we speak of a safe place, we mean the premises in and of themselves, the same as the tools or appliances. The premises in and of themselves are to be reasonably safe for ordinary use, by servants themselvs using reasonable care, but this does not imply any guaranty on the part of the master that such place may not be rendered dangerous by the negligent use of the same by fellow workmen, as in the case at bar. The track was

safe enough in itself, but the trainmen operating an instrumentality over the same in a negligent manner, through their negligence, rendered it unsafe, just as a section hand, in swinging a mallet furnished by the company, might swing it in such a negligent manner as to knock a fellow servant in the head, thus rendering the working place unsafe, yet in doing so he would not be representing the master, nor would the obligation with respect to furnishing a safe place be in any manner violated.

As reiterated by this court in quoting from the *Baugh* case, in the case of *Central Railroad Company* v. *Keegan*, on page 264:

"*Prima facie* all who enter the employment of a single master are engaged in a common service and are fellow servants. * * * All enter in the service of the same master to further his interests in the one enterprise."

The presumption is that they are all fellow servants and that one assumes risk of being injured through the negligence of all the others, until it be shown that the one whose negligence caused the injury was discharging some positive duty which rested upon the master.

When it is remembered that until 1837 there was no precedent to be found in England or in this country, even suggesting a right of recovery by a servant against his master for an injury received while performing the work of the master, and that the early cases thereafter were against the right, it must be deemed that as a general rule under the common law the servant takes upon himself all risks of being injured while in the employ of

the master, and any case which authorizes a recovery must fall within some exception to the rule.

The matter received the first careful consideration in the clear and lucid opinion of Chief Justice Shaw in the leading case of *Farwell* v. *Boston & Worcester R. R. Co.*, 4 Met., 49, decided in 1842. In that early case the plaintiff, an engineer running a passenger train on a railroad, ran his engine off at a switch on the road which had been left in wrong condition by a switchman. It will be seen that there the appliances were safe enough, so was the roadbed, but it was rendered unsafe by the negligent use of the same by the switchman, and no recovery was allowed.

In the recent case of *Hedley* v. *Pinckney & Son's Steamship Company, Limited*, in the Court of Appeals, before Lord Esher, M. R., Lopez and Kay, Lord Justices, (1892), Law Reports, 1 Q. B. Div., 58, it was decided that the captain and the crew employed in the navigation of a ship by the owner were fellow servants engaged in a common employment. The injury in that case was the result of the negligence of the captain in failing to have adjusted a movable railing before a storm, the railing having been supplied by the ship owners in proper condition. It is said by the Master of the Rolls:

"I think there was evidence for the jury of negligence on the part of the captain. I think that it was his duty under the circumstances to see that the movable rails which went on the top of the bulwarks at the place in question were in their proper position, at all events when the storm was coming on."

Yet it was held that this negligence was not the negligence of the master, because proper appliances had been furnished.

In *Armour* v. *Hahn*, 111 U. S., 313, a workman upon a building was injured by reason of a scaffolding defectively constructed, but as the scaffolding was put up by fellow workmen for the purpose of carrying out the common object of the master, it was held that the negligence, if any, was that of a fellow workman, it was a risk assumed and that no duty of the master had been violated.

A similar case is that of *Quebec Steamship Co.* v. *Merchant*, 133 U. S., 375, where the stewardess of a steam vessel, coming on deck to throw the contents of a pail over the side of the vessel at a gangway, leaned over the railing at the gangway composed of horizontal bars, which gave way because not properly secured. She fell into the water and was injured. The rods were moveable and had been improperly replaced by the porter and carpenter, but no recovery was permitted.

As the railroad company owed no positive duty to the men upon the hand car to protect them against any negligent use of the railroad by those operating the work train, it is manifest that the section foreman, in voluntarily assuming such duty, if he did, was not in doing so, discharging any positive duty of the master.

In reason, there can be no distinction made, based upon a difference in the grade of service. The real ground of liability of the master depends upon the character of the act of the

other servant as stated by this court. If the act performed or omitted which was the cause of the accident or injury was one which it was the absolute duty of the master to perform, the master will be liable, regardless of the position of the respective servants. If not, the master is not liable, regardless of the superiority or inferiority of the servants.

It is only necessary to cite a few of the recent authorities. Many of them will be found in an elaborate discussion of the question in the case of *Ell* v. *Northern Pacific R. R. Co.*, 48 N. W., 222.

See, also,

Ling v. *St. P., M. & M. Ry. Co.*, 52 N. W., 378.

Ross v. *Walker*, 21 At. Rep., 157.

Wood on Master and Servant, Sec. 438, pp. 860 and 863.

Lindvall v. *Woods*, 42 N. W., 1020.

Fraser v. *Red River Lumber Co.*, 47 N. W., 785.

Laughlin v. *City of New York*, 105 N. Y., 59.

Dwyer v. *American Express Co.*, 52 N. W., 304.

Moody v. *Hamilton Manufacturing Co.*, 34 N. E., 185 (Supreme Judicial Court of Massachusetts, 1893).

Quinn v. *New Jersey Lighterage Co.*, 23 Fed. Rep., 363, 365.

Crispin v. *Babbett*, 81 N.Y., 516.

Stockmeyer v. *Reed*, 55 Fed. Rep., 259, 261, and cases cited.

What Cheer Coal Co. v. *Johnson*, 56 Fed, Rep., 810, 812 (C. C. A., 8th Circuit).

This case falls clearly within the scope of the recent decisions of this court. Plaintiff, indeed, attempted to stulify himself in testifying as to his understanding with reference to the commands or orders of the section foreman, as though he were placed in the position of a peon. The effect of such evidence would be simply to afford an excuse to the jury to exonerate him from contributory negligence. It could not impose a greater duty upon the master than that which the law imposes.

In these cases it is always said by way of argument for lack of reason that the rule which exonerates the master from pecuniary liability in the given case is unjust and inhuman. What is there unjust in the rule which provides that one voluntarily entering the employment of another assumes the risk of injury through the negligence of others than his employer. How is it possible for the employer to prevent his employes, even including the one injured, at some time or other from being negligent. Ordinarily, why should one man be made pecuniarly responsible for the acts of another unless done in accordance with his express directions. As to third parties there may exist sufficient reason. Generally the reason is that the principal is supposed to be better able to respond pecuniarily in damages. But no actual wrong has been done by the principal or employer.

THE COURT ERRED IN REFUSING TO PERMIT DEFENDANT TO FULLY CROSS-EXAMINE PLAINTIFF.

It will be noticed that plaintiff testified in chief as to the length of time he had worked upon the railroad, to wit: three months, his understanding as to the duties of the section foreman in the way of ordering, his understanding that the section foreman should look out for trains while working upon the hand-car, and generally as to the nature and kind of work he had been doing. Thereupon, the defendant propounded questions to show by the plaintiff himself that trains passed frequently at all hours along the road and that they passed unexpectedly during the day. (See Trans., pp. 37, 38 and 39.)

Plaintiff's attorney objected as not proper cross-examination and objected to the defenadnt making out its case by plaintiff's testimony. This objection was sustained. It is somewhat remarkable, if a party to a suit voluntarily takes the stand, that the other side may not be permitted to cross-examine him to the full extent in order to develop the truth in the case. The purpose of the cross-examination was to show that the plaintiff himself knew that trains might pass at any moment and therefore he was assuming a risk incident to his employment. The tendency of the direct examination was to exonerate the plaintiff against the charge of contributory negligence. The tendency of this cross-examination was to show contributory negligence upon his part.

The English authorities hold that where a party to a suit puts a witness upon the stand the other side may cross-examine him as to the whole case, and this rule is adopted by some of the state courts. At an early day, the rule adopted in this court was to the effect that the cross-examination of an ordinary witness must be limited to matters drawn out by the direct examination. Under the English rule, a party who produced a witness vouched to the jury for his truthfulness in all respects. It was no doubt supposed by this court that such a rule worked a hardship in many instances, for a party was sometimes obliged to call an unfriendly witness in order to prove some material fact which could not be well established by other testimony, and in such case the party ought not to be held as vouching to the jury for anything more that the truth of the testimony drawn out by the party producing the witness. No such reason can exist, however, where one of the parties to the litigation voluntarily takes the stand as a witness in his own behalf. He has no right to conceal any portion of the truth, which is usually drawn out only after a rigid and searching cross-examination. There can exist no reason why the cross-examination in such case should be limited to the matters testified by the party in his direct examination. There is no injustice done to the party in such a case. Because of the limitation of the cross-examination of a party to the suit, this court, in *Gilmer* v. *Higley*, reversed the judgment of the lower court. (See 110 U. S., 47.) Mr. Justice MILLER says in the opinion:

"To permit a party to the suit to tell his own tale of a transaction like this, and to conceal what is important to the defendant in regard to the same occurrence, and at the same time, would be a gross perversion of justice, and would bring into discredit the policy of permitting parties to actions to testify in their own behalf."

We submit that when a party to the suit takes the stand in his own behalf an exception to the rule must be made and he should be compelled to submit himself to a rigid cross-examination so that the whole truth of the entire case may be set before the jury. The cross-examination, however, was germane to the direct examination.

Other Matters.

Our opponent, in his brief, has taken conflicting positions. On page 18 he states that there is a rule of the Supreme Court of the territory forbidding the trial court to settle a bill of exceptions containing the entire charge of court upon any general exception, and, therefore, the exception cannot be considered, while on page 20 he states that if necessary to support the ruling of the lower court in refusing to give an instruction complained of, this court will presume that the proper charge covering the same point was given by the court, and that the bill of exceptions does not affirmatively show that it contains the entire charge of the court. It is not necessary that the bill of exceptions should contain the entire charge. It is sufficient if it contains the part of the charge excepted to, and there is no presumption, in the

absence of an affirmative showing, that the charge which was requested by one of the parties and refused to be given was covered by some other charge not shown to have been given by the record. The presumption is that the error in refusing to give a charge is prejudicial unless it affirmatively appears from the record that no prejudice resulted. We submit that the Supreme Court of the territory might properly have considered the error in certain of the instructions given by the court.

It is claimed that exceptions were not taken until after the jury retired. This is evidently simply quibbling upon words. It must be remembered that by paragraph 2059, Compiled Laws of New Mexico, 1884, it is provided: "After argument the court may, also, of its own motion, charge the jury. Such charge shall be in writing in consecutively numbered paragraphs, and no oral explanation thereof shall be allowed." The instructions are in writing in separate paragraphs, so that when an exception is taken to each instruction under the practice of the territory it must be understood to be taken to each paragraph. A different rule would necessarily apply where the court is required to instruct in writing and in paragraphs than would apply in Circuit Courts of the United States where the court instructs orally. While immediately following the charge of the court, which we must presume to have been in writing, is the following language: "The jury retire"; simultaneously therewith it appears that the defendant excepted to the charge of the court, and each part thereof, and to the refusal to give in-

structions asked by the defendant, and the court thereupon stated that either side might have their exceptions entered and file them thereafter. This was acquiesed in and acted upon by the plaintiff as appears from his requests, and the plaintiff no doubt would have taken advantage of that if the verdict had been against him, though now he tries to take advantage of the informal way in which the record is made up—the verdict being in his favor. So it must be deemed that the defendant excepted to each instruction at least simultaneously with the retiring of the jury, and as the law required the instructions to be in writing, we do not see that any prejudice could possibly have resulted or that the exception could have been taken to the instructions any sooner. One of the paragraphs, it will be seen, instructed the jury that the defendant was liable for the negligence of the men operating the train. The old practice of stopping proceedings in court until the exception could be formally reduced to writing, handed up to the judge, signed and filed, was found too cumbersome for modern ways. The universal practice now is to have exceptions simply stated orally and time is given in which to reduce them to writing, to present a formal bill of exceptions, and after the same is signed it is filed and becomes the bill of exceptions, and it should simply show that the exception was taken at the trial. It makes no difference how unskillfully prepared the bill of exceptions may be. It will not be disregarded by this court.

See,

Simpson v. *Dall*, 3 Wall., 460, 473, 474.

The bill of exceptions is supposed to speak the words of the judge and not the words of any party to the suit.

In this connection, we might state that it appears from record, pages 89 and 90, that the amendment to the declaration which states the only pretended cause of action which is now so strenuously insisted upon, was not filed until the trial had ended, and that issue was tried over the objection of the defendant without written pleadings. The exceptions to the instructions were taken in time and evidently in accordance with the territorial practice.

There is nothing in section 2197 of the Compiled Laws of New Mexico, 1884, quoted on page 17 of opponent's brief, which precludes us. Exceptions to the giving or refusing of instructions must be taken at the time of such decision, but where the court reads to the jury its written instructions, they are not given until the instructions are all read and necessarily no exception can be taken until they are all read and when the jury is about to retire or is retiring. There is nothing in the practice in the territorial courts which requires that an exception should be taken or entered before the jury retires, nor does there exist any reason why it should be. If the court deem it necessary to give other instructions, it is simply obliged to reduce them to writing and recall the jury for that purpose. Many things are done at a trial contrary to rules with the apparent acquiescence of both parties and the judge, which could be readily remedied if timely objec-

tion were made. We submit a party should not be heard to complain of the breach of any rule with his apparent acquiescence. This would be giving him without reason an undue advantage.

On the whole we respectfully submit that the judgment should be affirmed.

E. D. KENNA,
ROBERT DUNLAP,
Attys. for Deft. in Error.